(24,311)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 567.

EVENS AND HOWARD FIRE BRICK COMPANY AND UNION SAND AND MATERIAL COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1914.

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1 THE UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to an order allowing appeal, filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Evens & Howard Fire Brick Company and Union Sand & Material Company, Intervening Petitioners, in the case of The United States of America, Complainant, vs. The Terminal Railroad Association of St. Louis, et al., Defendants, are Appellants, and you are Appellee, to show cause, if any there be, why the order and decree entered against the said Appellants, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Senior Circuit Judge of the United States for the Eighth Circuit, this 20th day of June, in the year of our Lord one thousand nine hundred and fourteen.

WALTER H. SANBORN,
United States Circuit Judge.

Service of the foregoing citation is hereby acknowledged this June 26, 1914.

_____

United States Attorney.

2 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I do hereby certify that at the city of St. Louis in the Eastern District of Missouri on the 26th day of June, A. D. 1914, I executed this writ by delivering a true and correct copy of this writ to Charles A. Houts, U. S. District Attorney.

EDW. F. REGENHARDT,
U. S. Marshal.

1 service $2.00.

By W. G. DAVIZ, *Deputy.*

[Endorsed:] No. 5250. United States District Court. Eastern Division of the Eastern Judicial District of Missouri. United States of America against Terminal Railroad Assn. of St. Louis, et al. Evens & Howard Fire Brick Co. and Union Sand & Material Co., Intervening Petitioners & Appellants. Citation. Filed Jun- 27, 1914. W. W. Nall, Clerk. Return.

3 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

Be it Remembered, that heretofore, to-wit: on the 23rd day of June 1914 there was filed in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri in the cause No. 5250, wherein United States of America is Complainant and the Terminal Railroad Association of St. Louis and others are Defendants, and the Evens and Howard Fire Brick Company and the Union Sand and Material Company are Intervening Petitioners, a Præcipe of said Intervening Petitioners for a transcript of the record upon an appeal allowed said Intervening Petitioners in said cause, which said præcipe is in words and figures, as follows, to-wit:

4 (*Intervening Petitioners' Præcipe.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Union Sand & Material Company and Evens & Howard Fire Brick Company, Intervening Petitioners.

Intervening Petitioners' Præcipe.

The Clerk will please prepare and transmit to the Clerk of the United States Supreme Court a typewritten copy and transcript of the following records, papers and documents in the above entitled cause:

First. Mandate of the Supreme Court.
Second. Interlocutory Decree.
Third. Final Decree.
Fourth. Motion of The Terminal Railroad Association to amend final decree.
Fifth. Motion of Evens & Howard Fire Brick Company to modify and amend final decree.
Sixth. Motion of Union Sand & Material Company to modify and amend final decree.
Seventh. Supplemental motions of fifty-three other parties to amend final decree. (The Motion of fifty-three other parties to amend final decree should be combined into one in the transcript, and the Clerk will kindly do so).

5 Eighth. Petition of Union Sand & Material —, Evens & Howard Fire Brick Company, and Fifty-three other parties for leave to file said petitions, and order granting leave to file same but denying intervention.

Ninth. Petition of Evens & Howard Fire Brick Company and Union Sand & Material Company for appeal, and order of court allowing their appeal.

Tenth. Assignment of Errors of Evens & Howard Fire Brick Company and Union Sand & Material Company.

Eleventh. Order granting appeal of Evens & Howard Fire Brick Company and Union Sand & Material Company.

Twelfth. Citation and Bond of Evens & Howard Fire Brick Company and Union Sand & Material Company, and approval of same.

JOHN F. LEE,
GEO. M. BLOCK,
Attorneys for Union Sand & Material Company and Evens & Howard Fire Brick Company.

Copy Received June 23, 1914.
CHARLES A. HOUTS,
United States Attorney.

Endorsed: Filed June 23rd 1914. W. W. Nall, Clerk.

And afterwards, to-wit: on July 7th 1914 there was filed by the United States of America a præcipe for additional parts of the record to be included in the transcript of the record on said appeal, which said præcipe is in words and figures, as follows, to-wit:

6 (*Præcipe of Complainant.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Plaintiff,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Union Sand & Material Company and Evens & Howard Fire Brick Company, Intervening Petitioners.

Præcipe of the United States Specifying Additional Matter.

To the Clerk:

You will please incorporate into the transcript on the appeal of the Union Sand & Material Company, et al., intervenors, from the order entered June 20, 1914, in the above-entitled cause, the following matter in addition to that specified in the intervening petitioners' præcipe, viz:

1. Petition of the United States appealing to the Supreme Court of the United States from the decree entered on March 2nd 1914.
2. The allowance of the appeal in open court, on March 27th, 1914.
3. The assignment of errors filed by the United States at the time it appealed from the said final order or decree.
4. The citation on said appeal, and the waiver of service thereof.

(Signed) CHARLES A. HOUTS,
United States Attorney.

Endorsed: Filed July 7th, 1914. W. W. Nall, Clerk.

The papers, pleadings and proceedings called for by the foregoing præcipes (with the exception of the citation called for in item four of the præcipe of the United States, which original citation was attached to the transcript furnished in behalf of the United States and transmitted to the Supreme Court of the United States)
7 are in words and figures, as follows, to-wit:

(Mandate of Supreme Court of United States.)

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Eastern District of Missouri. Greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, in a cause between The United States of America, complainant, and The Terminal Railroad Association of St. Louis et al., defendants, No. 5250, wherein the decree of the said Circuit Court, entered in said cause on the 6th day of June, A. D. 1910, is in the following words, viz:

Whereas upon full argument and careful consideration of this case two of the judges of this court were of the opinion that the complainant should prevail and two of the judges of this Court were of the opinion that the defendants should prevail, and each of them is of the same opinion still, and the Supreme Court of the United States has dismissed the certificate of this division of opinion and has remanded this cause to this court with direction to proceed in conformity with the laws of the United States

Whereas Honorable Charles A. Houts, United States Attorney for the Eastern District of Missouri, has made a motion on behalf of the complainant that this court listen to a reargument of this case, and the judges are unanimously of the opinion that further agreement thereof would be futile;

And Whereas the complainant cannot prevail because only two of the judges are of the opinion that it is entitled to any relief. whil- two are of the opinion that it is entitled to no relief.

It is hereby ordered that the motion for a reargument of this case be, and the same is hereby, denied and that the bill of complainant be, and it is hereby dismissed.

8 WALTER H. SANBORN,
WILLIS VAN DEVANTER,
WILLIAM C. HOOK,
ELMER B. ADAMS,
Circuit Judges."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, full and at large appears.

And whereas, in the present term of October, in the year of our

Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is here, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Missouri for further proceedings to be had therein in conformity with the opinion of this court.

April 22, 1912.

You therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed: Filed June 3rd, 1912. W. W. Nall, Clerk.

9 (*Interlocutory Decree.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

Interlocutory Decree on Mandate.

This cause came on to be heard at this term on the motion of the United States that an interlocutory decree be entered pursuant to the opinions of the Supreme Court reported in 224 U. S. 382, 411, and 223 U. S., 420. The United States of America, complainant, heretofore appealed to the Supreme Court of the United States from the final decree of this Court dismissing this cause on June 8, 1910, and the Supreme Court of the United States at its October Term, 1911, having heard the appeal upon a transcript of the record and having thereupon, on the 22nd day of April, 1912, ordered, adjudged and decreed that the said decree of this Court in this cause be reversed and that said cause be remanded to this court for further proceedings in accordance with the mandate of the Supreme Court in this cause bearing date May 23, 1912, which was recorded in this court on June 3, 1912, The Honorable Jacob

Trieber, United States District Judge, on June 11, 1912, entered an interlocutory decree pursuant to the mandate, but subsequently, on the petition for a writ of prohibition, the Supreme Court
10 of the United States rendered a decision to the effect that he was without jurisdiction to render such decree and that this case could be considered and determined only by a court composed of Circuit Judges in accordance with the provisions of the Expedition Act, Chap. 544, 32 Stat. 823.

Now, therefore, in obedience to the mandate of the Supreme Court and in accordance with the opinions of that court, to which reference has been made, it is hereby ordered, adjudged and decreed that the interlocutory decree hereinbefore rendered on June 11, 1912, by the Honorable Jacob Trieber, District Judge, be, and the same is hereby, set aside and for naught held pursuant to the opinion of the Supreme Court; that within sixty days after the entry of this decree the Terminal Railroad Association of St. Louis and the fourteen railroad companies defendants herein, their successors and assigns, if any, and such other companies as may have become co-members with the fourteen defendant railroad companies, if any, shall submit to this Court a plan, upon which the defendants herein shall have agreed, for the reorganization of the contracts, agreements, arrangements and leases, and the use and operation of the properties and terminal facilities of the defendants herein, between the Terminal Railroad Association of St. Louis, Missouri, and its fourteen co-defendant railroads, as aforesaid, as will make said contracts conform in all respects to the terms and conditions hereinafter mentioned.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company on a plane of equality in respect of benefits and burdens with the present proprietary companies.

11 Second. Such plan or reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company as nearly on an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating in the so-called one hundred mile area, that is not equally or in like manner applied in respect of all other traffic of like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the Terminal or proprietary companies which shall arise after a final decree in this cause, may be submitted to this Court upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. It is further ordered, adjudged and decreed that the said parties also present at the same time a proposed form of final decree in accordance with the directions of the Supreme Court
12 in its mandate and opinion, which shall contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint rates or routes over its lines, or any other power conferred by law upon such commission.

Eighth. Upon the failure of the parties defendant to come to an agreement within sixty days from the entry of this decree which is in substantial accord herewith, the Court will, after hearing the parties to this cause, upon a plan for the dissolution of the combination between Terminal Company, The Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, as may be necessary, enjoining the defendants, singly or collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future combination of the said systems in evasion of such decree or any part thereof.

WALTER H. SANBORN,
WALTER I. SMITH,
Circuit Judges.

April 30, 1913.

Received and filed and entered June 16, 1913.
W. W. NALL, *Clerk.*

13 (*Opinions of Court on Entry of Interlocutory Decree.*)

In the District Court of the United States for the Eastern District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

SANBORN, *Circuit Judge:*

The United States moves the Court to enter the preliminary decree in this case specified in the opinion of the Supreme Court in

224 U. S. 410, to the effect that the defendants present for the consideration of this Court a proposed reorganized contract and final decree. We agree and shall insist that the true intent and meaning of the direction of the Supreme Court that "any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one-hundred-mile area that is not equally and in like manner applied in respect of all other traffic, of like character originating outside of that area," shall be abolished and of every other direction of that court in its opinion and mandate in this case must be carried into complete effect by the new contract and the final decree. In our opinion the interlocutory decree now to be entered as clearly so directs as does the opinion and mandate of the Supreme Court.

14 The question presented by the motion now in hand is not what the final decree shall be, nor by what terms the abolition of the so-called arbitrary shall be effected. Counsel for the respective parties do not agree regarding the present existence of the character of this so-called arbitrary, nor upon the provisions of the final decree by which it should be abolished, and they ask a full hearing upon these questions before they are decided and before the terms of the contract and final decree are settled. Counsel for the United States in their last brief state that the government submits it "with the understanding that the final decree is not now under consideration" and "requests that it be given an opportunity to be heard upon the question of what the final decree shall contain."

We are of the opinion that this request should be granted, that, after a proposed contract and final decree are submitted to this court, pursuant to the interlocutory decree and before the crucial issues now pending are decided, and before we form or express our final opinion concerning them, counsel for the parties should be heard upon them after they know that the hearing is not preliminary, but final. Hence we decline to enter upon a discussion or decision of the merits of the main issues now remaining in this case and, except as stated above, and in the interlocutory decree, we decline either to adopt or to repudiate the views attributed to us by our learned associate, Judge Hook. Indeed, we endeavor, and shall endeavor until after the final hearing upon the terms of the contract and of the final decree, to keep our minds open and to avoid the formation or expression of our opinion upon these issues because this case is here now on a mere motion to enter the preliminary decree directed by the Supreme Court to the effect

15 that "the parties submit to the Court within ninety days after receipt of the mandate, a plan of reorganization of the contract between the fourteen defendant railroad companies and the Terminal Association," which is required to contain the six provisions specified in the interlocutory decree filed herewith, and that decree in our judgment completely effectuates the direction of that Court regarding this preliminary decree. It will be early enough to consider and determine the terms and provisions of the proposed contract and of the final decree when they have been presented for our consideration and after final hearing of the parties have been submitted to us for decision.

16 In the District Court of the United States for the Eastern District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
v.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

HOOK, *Circuit Judge:*

A difference has arisen between my brothers and myself over the meaning of the opinion and mandate of the Supreme Court in this case. It comes in this way: On February 25, 1913, the Government filed and presented to us two motions. The first to vacate an order of September 3, 1912, declining, by an equal division of the Circuit Judges, to take further cognizance of the case, the Supreme Court having subsequently held that the jurisdiction of those judges still continued and should be exercised. The other was entitled "Motion for filing of mandate and entry of interlocutory decree." This is the motion which presents the matters now before us. The Government tendered with the motion a form of interlocutory decree, which it asked us to adopt and enter, enjoining the defendants from continuing to impose certain special charges as being wrongful and contrary to the decision of the Supreme Court (224 U. S. 383). At the hearing of the motion defendants insisted that a form previously approved by the District Judge (without jurisdiction, 226 U. S. 420) was the
17 proper one. It contained no injunction, left the defendants free to continue their practice, and remitted the matter in general terms to a subsequent modification of the contracts between the defendants. The Government earnestly objected to that form of interlocutory decree as insufficient to give the relief the Supreme Court intended it should have. There was an exhaustive discussion in open court involving the interlocutory decree proposed by the Government, the meaning of the opinion of the Supreme Court, whether what defendants were still doing was contrary to that opinion and if so should be enjoined by the interlocutory decree, or on the other hand should be merely abolished by subsequent contract between the defendants. At the conclusion of the arguments we made an order of which the following is the pertinent part, the italics being mine:

"And the said complainant further files and presents to the court a motion to vacate the order entered herein on September 3rd, 1912, together with a motion for the filing of the mandate of the Supreme Court *and for the entry of the interlocutory decree in the form now tendered;* whereupon the court after hearing the arguments of counsel for the respective parties doth order that the said defendants be and they are hereby allowed five days from this date *to file any objections and brief in opposition to the said form of interlocutory decree,* and that the said complainant be and it is hereby allowed five days therafter for reply thereunto; whereupon, *the said motions shall be taken as submitted to the court.*"

The briefs furnished under this order also contain a full discussion, particularly as to whether the continued practice
18 of defendants had been condemned by the Supreme Court and should be enjoined. As will be shown presently, counsel for defendants openly and candidly stated in their brief what they were still doing, but contended it was consistent with the opinion of the Supreme Court. The Government contended in its brief that the practice was condemned by the opinion and that the interlocutory decree it proposed was drawn on that theory. I do not think I am mistaken in saying that my brothers sustain defendants in their contention. Their view is not fully expressed, but it is foreshadowed in the interlocutory decree about to be entered. That decree is substantially in the form of one entered by the District Judge which we vacated. It contains no injunction or award of the relief against the continued imposition of the special rates and charges sought by the Government in its proposed form of interlocutory decree.

I therefore deem it proper and timely to put upon the record what I think the Supreme Court said and intended and a recital of what the defendants are still doing. It is not premature. It is in response to the motion of the Government submitted to us after full argument. I know of no request that our decision be delayed for further argument at final decree. Certainly nothing of the kind appears in the briefs on file. This matter should not be confused with the plan hereafter to be submitted to us for reorganizing the combination of the defendants and reforming the contracts among themselves. That is for the final decree and there is little disagreement and no difficulty about it. When counsel for the Government, by way of precaution, said in their brief that the final decree was not under consideration and that they wished an opportunity to be heard upon its contents, they were addressing themselves to a statement of opposing counsel that the Dis-
19 trict Judge intended to enter a final decree which would be "merely in effect a recital of the order of the Supreme Court." They were not asking that our decision upon their motion and the injunctive provisions of the interlocutory decree so fully presented and argued, be postponed for a further argument. They cannot reasonably be put in that position. The question of injunction is up for decision now. The combination known as the Terminal Association is still acting as a terminal agency. The Supreme Court holds that while doing so certain special or arbitrary charges cannot lawfully be made. If what defendants admit is still being done is wrong, it is wrong now; and the Government is entitled to an injunction at this time and to know definitely just what is enjoined. An injunction is a very proper function of an interlocutory decree when, as here, the facts are admitted and the law has been finally and authoritatively settled by the court of last resort. Nor does it make against this that the injunction may also be carried into a final decree subsequently to be entered. So I say again a decision having been invoked is both timely and proper. If I have misapprehended the position of my brothers

what I shall say will at least serve the parties as a guide, in preparing the final decree, in respect of those things already presented, argued and submitted but passed by. I will not discuss or prejudge any disputed question about the "plan of reorganization" to be submitted and determined at final decree. Reference thereto will be made only so far as there is no controversy and to illustrate those matters which I think should be settled now. Within the above limits, the following conclusions from the opinion of the Supreme Court seem clear:

20 1. The Terminal Railroad Association of St. Louis is a combination prohibited by the Sherman Anti-trust Act if its constituents (the various bridges and terminal companies) are to be regarded as transportation companies or are operated as such.

2. The Association may be upheld, however, as a lawful unification of terminal facilities (as distinguished from ordinary transportation railroads) upon (*a*) certain modifications of the articles of agreement with the proprietary railroad companies, and (*b*) stopping certain administrative practices. These conclusions of the Supreme Court were due in substantial measure to the exceptional topographical situation at St. Louis and vicinity and they would not necessarily apply elsewhere. Cases elsewhere are not necessarily precedents here.

3. The articles of agreement are to be so modified that any existing or future railroad may be admitted to joint ownership or control of the combined terminal properties upon just and reasonable terms securing equality in benefits and burdens with the present proprietary companies; to allow the use of the facilities upon just and reasonable terms and regulations by any railroad not desiring to become a joint owner; and to eliminate from the agreement any provision restricting the proprietary companies to the use of those facilities. And provision is to be made for the submission to this court of certain controversies growing out of the foregoing. Compliance with the above requires merely the contractual action of the defendants.

4. The opinion of the Supreme Court also requires "an inhibition of certain methods of administration." Obviously, in this
21 as in all cases of like character, the inhibition of wrongful practices should be by injunctive decree and not left to rest solely upon stipulations in a contract. The wrongful practices of defendants pointed out by the Supreme Court were directed against the public, not parties to the contract, and it would be quite anomalous if upon a showing in the future that defendants were persisting in them the court should be without punitive power, but could merely declare a breach of contract. As to these I think the opinion of the Supreme Court means that an injunction should be awarded. As the facts are admitted and the law settled the injunction when asked should be granted and not postponed to final decree.

5. The practices referred to are described in the fourth and fifth paragraphs of the directions for a decree set forth in the opinion as follows:

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

The principal difference between my brothers and myself, as well as between counsel, is over the meaning of the last of these paragraphs. I think that when read, as it should be, in the light of the entire opinion and the record in the case the meaning is quite clear. But whoever is right I take it as highly de-
22 sirable that the prohibition be expressed in the decree with such detail gathered from the opinion and record that no doubt can reasonably be entertained of its scope and purport. This is especially important in a case of injunction, a violation of which may be followed by punishment; or if it be not done, then that the decree be accompanied by an opinion indicating definitely the attitude of this court, to the end that the parties may conduct themselves accordingly. To put the precise words of the fifth paragraph in the decree without more, as is proposed, does not end the case, but establishes a starting point for further controversy and litigation.

7. In considering the fifth paragraph it should be borne in mind that the Supreme Court holds that the Terminal Association can lawfully operate only as a terminal agency of the various carrying railroads. As such it may make the usual charges for terminal services like switching and warehousing, but it cannot lawfully interpose itself as a transportation company between western roads in St. Louis, Missouri, and the eastern roads in East St. Louis, Illinois, and make charges for services of that character. It logically results from this that the two cities (and certain towns to which for brevity no further reference need be made) constitute one commercial and manufacturing center connected and served by an aggregation of terminal facilities in which all the railroads are or may be interested and which all may use. As regards transportation rates the several localities of this industrial center should be upon a parity without discrimination, arbitrary or differential; otherwise the Association becomes at once an unlawful combination of carrying railroads. The prohibition in the fourth paragraph of
23 the practice of requiring shippers to rebill at East St. Louis the traffic destined to St. Louis or beyond is in line with this view; also the court's references to the exceptional physical situation in that locality. The testimony before the Supreme Court discloses the conditions to which the fifth paragraph is directed. It shows that no distinction was being made between St. Louis and East St. Louis in respect of rates on traffic originating or destined outside of an irregular area about those cities having a radius of approximately one hundred miles. In respect of those rates the cities were one. Mr. Perkins, the witness referred to in the opinion,

said by way of example: "A shipment coming from say Kansas City to St. Louis has the same rate as a shipment coming from Kansas City to East St. Louis." He also said the two cities were on a parity as regards rates on west-bound shipments from points outside the area referred to. But the situation was entirely different as to rates on traffic originating and ending within the limited area. Concerning these Mr. Perkins testified as follows:

"But the basis of rates between St. Louis and points within the one hundred mile radius east of here, is higher than between East St. Louis and those points, taken by itself. The basis of rates between East St. Louis and the points within one hundred miles west of here is higher than the basis of rates between St. Louis and points west of here."

The report of the Municipal Bridge and Terminal Commission to the Municipal Assembly of St. Louis on February 11, 1908, contains this paragraph:

"In the report of May 24, 1907, reference was made to an
24 arrangement perfected at a meeting between the executive traffic officers of Eastern Lines and your Commission, on April 19, 1907, for the removal of the last of the bridge arbitrary differentials on business between St. Louis and points beyond a 100 mile radius. That arrangement has now been carried out."

In view of some contentions of defendants' counsel which will be presently mentioned three things about the above excerpt may be noted: First, the charge in question is referred to as "bridge arbitrary differential;" second, the charge was removed from business outside the 100 mile radius; and third, the removal was effected by arrangement with "Eastern Lines," not with the Terminal Association. Counsel assert the right of defendants to continue within the 100 mile area the additional charge as between the two cities which was removed outside, and in this as I understand it, they are upheld by my brothers. Counsel for defendants say in their brief:

"We understand it to be true that the railroad companies, parties to the case, make a higher charge for St. Louis than East St. Louis on some traffic originating within the so-called one hundred mile area. There is a zone beyond the one hundred mile area, in which the entire charge for the use of terminal facilities of the Terminal Association is absorbed in the through railroad rates, making the East St. Louis rate applicable to industries on the Terminal Association and railroads in St. Louis."

25 They contend this was not what the Supreme Court had in mind, but since the record shows no other existing condition to which the fifth paragraph could apply they are driven to the suggestion that the Supreme Court labored under a misapprehension because the charge now made is not an arbitrary and is not imposed by the Terminal Association but by the railroads. It is not important what this charge for transportation across the river between St. Louis and East St. Louis may be called. In the testimony it was referred to interchangeably as an arbitrary, a differential and a special charge. The Supreme Court referred to it

as "a special or so-called arbitrary charge." Mr. Perkins said: "It makes no difference whether you call it arbitrary or differential, or what, it is an amount paid." And as we have seen the Terminal's Commission referred to like charges on traffic coming from or destined outside the area as "bridge arbitrary differentials." It is equally unimportant that instead of being imposed by the Terminal Association as was once the case it is now being added by the proprietary railroads to their freight rates. In either case it is not a terminal switching charge, but is a transportation charge as to which the two cities are not upon a parity. The combination of terminal facilities at St. Louis cannot lawfully operate or be operated as carrying railroads. The record before the Supreme Court showed clearly that when the testimony was taken the special charge was not being made as a separate, distinct item, but was added to and included in the freight rate within the 100 mile area. Mr. Perkins testified that it was still there. I think the Supreme Court was dealing with the situation so disclosed and with substance, not form. Whether imposed by the Terminal Association as an agency or by the proprietary railroads as principals the arbitrary was equaly objectionable as a transportation charge and worked a burden on the commerce of St. Louis. I repeat here the
26 direction of the Supreme Court: "the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of the traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area." In applying this, effect must be given to the phrase "equally and in like manner."

By the opinion and mandate the Supreme Court defined the permissible character of the Terminal Association as a combination of terminal facilities reaching and serving a common commercial and manufacturing center; directed changes in its organization to adapt it to local conditions; conceded the right to charge and collect for proper terminal services; denied the right in it or its proprietors to charge and collect transportation rates for carriage across the river as though the cities were distinct communities; and directed the inhibition of certain practices not in harmony with the above. Having so fixed the status of the parties the Interstate Commerce Commission was left free for the exercise of its jurisdiction.

Filed June 16th, 1913. W. W. Nall, Clerk.

27 (*Final Decree and Opinion of Circuit Judge Smith.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

This cause came on to be heard at this term, and it appearing that the United States of America, complainant, heretofore appealed to the Supreme Court of the United States from the final decree of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, dismissing this cause on June 6, 1910; and the Supreme Court of the United States at its October Term, 1911, having duly heard said appeal upon the Transcript of the Record, and having thereupon on the 22nd day of April, 1912, ordered, adjudged and decreed that the said decree of the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri in this cause be and the same is hereby reversed, and that said cause is remanded to this Court for further proceedings in accordance with the mandate of the Supreme Court of the United States in this cause, bear-
28 ing date the twenty-third day of May, 1912.

And afterwards, to-wit, it appearing that on the 16th day of June, 1913, a preliminary decree was entered in accordance with the mandate of the Supreme Court, now, therefore, it is ordered, adjudged and decreed by the Court as follows:

1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.

An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered.

2. The Agreement of October 1, 1889, between the Terminal Railroad Association and various other defendants, known in the record as Exhibit "A", shall be reformed in the following manner:

(*a*) The provision thereof reading as follows shall be eliminated: "III. In consideration of the foregoing each of the proprietary companies, for itself only and not for others, accepts the right of joint use hereinbefore granted by the first party and hereby covenants and agrees that it will forever make use of the bridge and terminal properties of the first party, as above described, for all passenger and freight traffic within its control through, to and from St. Louis and destined to cross the Mississippi River at St. Louis, and pay therefor as herein provided."

(*b*) The provision thereof reading as follows shall be eliminated: "XVII. Neither party shall sell, assign, transfer or underlet the rights and privileges hereby granted, or any of them, to any other company or companies without the unanimous consent of the Board of Directors of the first party."

In lieu thereof the following may be inserted: "No proprietary or using company shall sublet its rights and privileges in the use of the terminal facilities to any other company or companies."

(*c*) The provision thereof reading as follows shall be eliminated: "XIX. This agreement may be executed in counterparts, and any railroad company not named as second party hereto, may be admitted to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement or any counterpart thereof thereby indicating its rights and duties in respect to use of said terminal system to be the same and none other than the said proprietary companies named as second party hereto."

In lieu thereof the following shall be inserted:

(1) In case any other railroad company, not named as second party hereto, shall hereafter desire to become a member of the Terminal Railroad Association of St. Louis, it may become a member thereof, with equal rights of joint ownership and control of the combined terminal properties of said Association, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens of the parties hereto of the second part.

(2) Any other railroad company not electing to become a joint owner as above provided, but desiring the use of the terminal facilities of the Terminal Railroad Association of St. Louis may enjoy the use thereof upon such just and reasonable terms and regulations, as will in respect of use, character and cost of service, place it upon as nearly an equal plane as may be, with respect to expenses and charges, as that occupied by the proprietary companies.

(3) Any dispute or controversy which shall hereafter arise between any railroad company applying for joint ownership or use of the said terminal properties and the owning, proprietary com-

panies shall be submitted to the United States District Court for the Eastern Division of the Eastern District of Missouri by filing a petition in this cause setting out specifically the facts upon which the said parties have disagreed and the party so filing said
31 petition shall at least fifteen (15) days before so doing so serve the other party to the controversy with a copy of the petition proposed to be filed, together with a notice that said petition will be filed on a certain designated day. Thereupon the matter shall be placed upon the docket of the United States District Court for the Eastern Division of the Eastern District of Missouri, and shall be heard when called in its regular order on said docket and the proceedings shall be subject to review by appeal as in any other cases. Upon being advised by the filing of a petition of such dispute or controversy the Court may at once admit the applying company to ownership or use of the terminal facilities during the pendency of the proceeding upon the giving of security in amount and form as it may direct.

(*d*) All provisions of the purport or effect of those eliminated from the Agreement of October 1, 1889, shall also be removed from all other contracts affecting the ownership or use of the terminal facilities to which the Terminal Railroad Association and the proprietary companies or any of them are parties. The benefits and burdens of the amended agreement shall inure to and rest upon all future proprietary and using railroad companies respectively.

3. Hereafter traffic destined to St. Louis, Missouri, or to points west of the Mississippi River and to be transported through the St. Louis gateway or traffic from St. Louis, Missouri, destined to points east of said river, shall not be billed to East St. Louis, Illinois, or other junction points or termini of the railroads of any of the said railroad companies east of the river and then rebilled to destination, but for all such traffic each railroad company shall issue through bills of lading unless otherwise directed by the person controlling the same. The defendants are perpetually enjoined from violating the above provisions.

32 4. The defendants are perpetually enjoined from making any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

5. The provisions of this decree shall extend to and embrace all railroad companies now or hereafter admitted to joint ownership or use of the facilities of the Terminal Railroad Association and to all its facilities present and future acquired.

6. Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

7. This cause is reserved for such further orders and decrees as may be deemed necessary.

WALTER H. SANBORN,
WILLIAM C. HOOK,
WALTER I. SMITH,
Circuit Judges.

St. Louis, January 29, 1914.

Filed March 2, 1914. W. W. Nall, Clerk.

33 In the District Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

SMITH, *Circuit Judge:*

The members of the Court have entertained and now entertain divergent views as to what the decree in this case should be notwithstanding the opinion of the Supreme Court, which is our guide and which all of us are cheerfully desirous of following according to its true intent.

The foregoing decree is in the nature of a compromise of these divergent views and as such I have signed it, but I could not do this without expressing my personal opinion briefly upon the subject.

The fixing of rates for the future is a legislative and not a judicial function.

There are numerous roads which do not extend beyond the State of Illinois which terminate at East St. Louis. One of these
34 is only eight or ten miles long. It probably cost not to exceed three hundred thousand dollars for the entire road. It is now contended that the Supreme Court meant to hold that for whatever price this road saw fit to haul coal to East St. Louis or for whatever price might be fixed by Illinois it must haul it to St. Louis over property including bridges, right-of-way and trackage worth many millions of dollars.

I cannot reach that conclusion and chiefly because such a decree would be beyond the jurisdiction of this or any other human court even as a part of the jurisdiction of a court of equity to award complete relief. It is distinctly a legislative function and until Congress or the Interstate Commerce Commission shall so fix the rates no judicial tribunal has any power to so decree.

2. Not only has the Interstate Commerce Commission not so decreed, but it has long held that such an order should not be made.

Commercial Club of Omaha v. C. R. I. & P. Ry. Co., 6 Interstate Commerce Commission Rep., 647;

See other cases cited in Pierce's Digest of Decisions under Act to Regulate Commerce, 405-6-7.

3. Wholly aside from both of these questions if this decree means the rate must be the same from points in Illinois to East St. Louis, Illinois, and to St. Louis, Missouri, then an intrastate and an interstate rate are indissolubly united and the State of Illinois has thus power to fix interstate rates.

It has recently been held that before State rates can be
35 declared unconstitutional the entire intrastate business must be taken into account.

For this reason the State of Illinois could put in a non-compensatory coal rate to East St. Louis if the rates as a whole were compensatory.

There is substantially no limit the State cannot go to in reducing the rates on any given commodity provided the entire body of rates is compensatory.

It was held in the Minnesota Rate Cases, 230 U. S. 352, that the Interstate Commerce law did not divest the State of the power to make rates throughout its limits and so under no provision of the existing law, State or Federal, could the rate on coal from points in Illinois to East St. Louis be decreed invalid unless the entire schedule of rates was non-compensatory.

It is apparently the opinion of at least a part of the Court that this decree without legislative action ties interstate rates onto State rates so that while the United States under existing laws cannot control State rates a State may control United States rates.

This is abhorrent to me and I do not think is the true construction.

Assuming without admitting that a terminal company cannot establish different switching rates for different zones I submit that the various railroads independently of what they pay for switching may establish one rate to East St. Louis and another to St. Louis and in the absence of some action by Congress or the Interstate Commerce Commission there is no power to interfere with their doing so under this decree or otherwise.

Except Congress or the Interstate Commerce Commission act there is no one authorized to so order.

Assuming again that the Terminal Company cannot es-
36 tablish different switching rates for different zones, I am satisfied that irrespective of what switching rates they have to pay the railroads have the right to charge a higher rate into St. Louis on Illinois coal than they do to East St. Louis on the same coal.

Filed March 2, 1914. W. W. Nall, Clerk.

37 (*Motion of Defendants to Modify Final Decree.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
v.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

Come now the defendants in the above entitled cause and move the Court to modify Article 1 of the Final Decree herein entered, which is as follows:

"1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation, and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.

"An election having been made to continue the combination for terminal purposes, the defendants are therefore, perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies, and from operating any of the properties belonging to it or its constituents, otherwise than as terminal facilities for railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully
38 authorized to be rendered."

By striking out all of said paragraph:

First. For that, it appears that the defendants herein have conformed to the special directions contained in the Supreme Court's decree herein and the special directions of the interlocutory order of this Court herein, pursuant to the mandate of the Supreme Court, and, having done so, said Terminal Association has ceased to be an unlawful combination, contrary to the Anti-Trust Act of July 2, 1890, as found by this Court in the first paragraph of said Article 1.

Second. Because defendant, Terminal Railroad Association of St. Louis, is enjoined from making charges otherwise than for supplying and operating facilities for the interchange of traffic between railroads, and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and is required to abandon all operating methods and charges as and for railroad transportation;

For that, while the general scheme and purpose of the Terminal Association, and its subsidiary companies is that of affording terminal advantages and facilities to railroad companies, yet, as an incident to that business, and on account of the necessary extent of its tracks, covering an area of seventy-five to one hundred square miles, it is frequently called upon to take traffic from one point on its line to another point on its line, completing the entire movement on its own tracks.

As an illustration: The Terminal Association operates in the early morning and late in the afternoon some trains to transport laborers engaged in industrial factories from Granite City, Illinois, to the different stations on its line in St. Louis, Missouri. This it is prohibited from doing under the decree.

Another illustration: Many factories are located upon the Terminal Association's tracks on both sides of the Mississippi River. Under this order the defendant, Terminal Association, would be restrained from accepting either raw material or finished products shipped from one such factory to another, although it could, with great convenience to the public, render such service.

These are incidents, but very important incidents, to the principal business of the Terminal Association, and, we submit, were not in contemplation of the decree ordered by the Supreme Court.

H. S. PRIEST,
T. M. PIERCE,
Attorneys for Defendant.

Endorsed: Filed March 28th 1914, W. W. Nall, Clerk.

39 (*Motion of Evens & Howard Fire Brick Company to Modify and Amend Final Decree.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; EVENS & HOWARD FIRE BRICK COMPANY, Intervenor.

A. & J. F. Lee, Solicitors for Intervenor.

40 In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; EVENS & HOWARD FIRE BRICK COMPANY, Intervenor.

Now comes Evens & Howard Fire Brick Company and states that it is a corporation organized and existing under the laws of the

State of Missouri, having its chief place of business in the City of St. Louis in said State. That in the year 1908 it built, and has since maintained, and is now operating, a fire brick plant in the County of St. Louis, Missouri, on the line of the above
41 named defendant, at a cost of Five Hundred Thousand Dollars ($500,000) for the manufacture of fire brick and other kindred products; that the output of said factory is in value about Five Hundred Thousand Dollars ($500,000) per annum, and this petitioner states that it employs at its said plant 250 persons and at its mine, hereinafter mentioned, 50 persons; that this petitioner requires for the conduct of its business large quantities of fire clay; that it has secured a tract of land on the line of said defendant five (5) miles distant from its said plant, from which it has a right to obtain, and can obtain, sufficient supplies of fire clay to operate its said plant at its full capacity for twenty (20) years; that it has no other supply of fire clay; that the same cannot be bought in the market, and your petitioner knows of no source at present from which fire clay could be obtained for its work except from said mine, unless at prices which would be so high, or conveyed to said plant by methods other than railroads, which would be so costly as to be prohibitive.

Your petitioner says that it has purchased and is about to put into operation a number of cars in which fire clay is to be loaded at said mine, carried thence over the switch at said mine to the main tracks of said defendant and moved over said tracks by defendant to the said switch at the plant of this petitioner and over said switch to its works, and there unloaded of said clay and the empty cars returned in the same manner to said mine, said cars being in number and capacity sufficient to carry all the fire clay needed to supply said plant when in operation. That heretofore, and before said purchase, the clay used by said petitioner has been moved in cars belonging to railroads other than said Association between
42 the points and in the manner above mentioned, and said cars when emptied were either returned to said mine for reloading with fire clay or sent elsewhere. That, in order to supply said plant with fire clay, it will be necessary that there should be so moved over said line into said plant from said mine not less than two thousand loaded cars per year. That the movement of said cars from said mine to said plant would be wholly over the lines of said defendant and would not be in any way competitive with any other railroad as to rates or otherwise, and that neither said mine nor said plant is reached by any other railroad. That without said supply of clay said plant of this petitioner would be valueless and could not be operated at its present position; that its wreckage value would not exceed Ten Thousand Dollars ($10,000.), being mostly underground conduits, which would be entirely destroyed, and brick work, which would be valueless, if removed.

Your petitioner says that on the 22d day of March, 1914, this Court entered in the above entitled cause a final decree and that Section 1 on Page 2 of said final decree reads as follows:

"The defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Associa-

tion or any of its constituent companies, and from operating any of the properties belonging to it or its constituents, otherwise than as terminal facilities for the railroad companies using the same."

Said section of said decree further provides that the Terminal Railroad Association may continue as a lawful unification
43 of terminal facilities "upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads."

Petitioner states that giving this language a literal construction the Terminal Association would thereby be enjoined and prohibited from performing the services for your petitioner above stated to be performed, for the reason that giving the language of the decree a literal construction, such handling and moving of said cars from petitioner's mine to its said plant and the return of said cars when empty are not "an interchange of traffic between railroads," and might be held and construed to be "the doing of business as railroad transportation."

Petitioner says that at no time did it have any knowledge or information that any such question was involved in said cause, or that any question of the legality of the movement of its traffic from one point on the Terminal Association tracks to another was involved, and that the first information it received as to the nature and terms of the final decree, as entered in said cause, was obtained from the public press on or about the 1st or 2nd of April, 1914.

Petitioner says that a very grave and irreparable injury would be done to it if, by the terms of the decree entered in this cause, the Terminal Association were precluded and enjoined from continuing to move its clay from said mine to said plant or to move the empty cars of this petitioner from said plant to said mine.

44 Petitioner says that it is informed that the Terminal Railroad Association has filed in the above entitled proceeding a motion to modify Article 1 of the said final decree, and has attached to said motion an exhibit purporting to show the various persons and corporations whose situation in regard to certain service over the Terminal Railroad Association tracks is in many respects like that of your petitioner, and which exhibit purports to show the number of cars moved by the said Terminal Association during the year 1913 for said persons and corporations where the movement required like service to that hereinabove set forth as being done and required for your petitioner.

Your petitioner states that whilst it appears by said exhibit that the cars moved in the year 1913 for your petitioner were only 474 cars, that the rate at which cars now are being moved for your petitioner by said Association in the manner mentioned, is 2,000 cars per year, which rate this petitioner is informed and believes will continue hereafter or be largely increased, if permitted by this Court.

Said exhibit further shows that 521 industries, including this petitioner, are substantially similarly situated on the lines of said Association. The entire service, therefore, performed over the Terminal Association's own lines, for the year 1913 was 30,584 cars.

Petitioner says that none of the business so being moved by the said Association for this petitioner over its own lines was competitive with any railroad constituting one of the proprietary lines in said Association or with any other railroad.

45 Wherefore, the premises considered, petitioner prays that the final decree heretofore entered in said cause may be so altered, amended and changed, as not only to permit the Terminal Railroad Association to continue to perform such services for your petitioner as it is above stated said Association is rendering this petitioner by moving its said cars between the mine of this petitioner and its plant, even though the moving thereof from said initial point to said delivery point be entirely over the lines of said Association, but also prays that said decree may be made so clear and plain that petitioner and others substantially similarly situated as is petitioner may be entitled to demand and require of said Association the moving of cars from one point on the line of said Association to other points on said lines, even though the moving of said cars be entirely over the lines of said Association; and that petitioner and others substantially situated may be placed in a position where such duty on the part of said Association may be enforced by them, should such service be at any time declined or refused by said Association. And petitioner further prays that it may be permitted to appear by counsel and be heard on the proposed amendment or modification of said decree, either jointly with the hearing granted the Terminal Association, or at such other time and place as to the Court may seem meet and proper. And your petitioner prays for such other and further relief as to the Court may seem proper.

EVENS & HOWARD FIRE BRICK COMPANY,
By A. & J. F. LEE, *Solicitors.*

46 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

On this 18th day of April, 1914, before me personally appeared Cecil D. Gregg, who, being first duly sworn, did say: I am the president of the Evens & Howard Fire Brick Company, a corporation, and, as such, have personal knowledge of the matters and facts stated and set forth in the foregoing motion; and affiant says that the matters and facts stated and set forth in the foregoing motion are true.

(Signed) CECIL D. GREGG.

Subscribed and sworn to by Cecil D. Gregg before me, this 18th day of April, 1914.

(Signed) JAMES A. WAECHTER,
[SEAL.] *Notary Public.*

My commission expires Jan. 5, 1916.

Endorsed: Filed June 20, 1914. W. W. Nall, Clerk.

47 *(Motion of Union Sand & Material Company to Modify and Amend Final Decree.)*

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

Motion of the Union Sand and Material Company to Modify and Amend Final Decree and for Leave to be Heard on said Motion.

George M. Block, Solicitor for Union Sand & Material Company.

48 In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

Comes now the Union Sand & Material Company and shows to the Court that it is a corporation organized and existing under the laws of the State of Missouri, and engaged, among other things, in digging and dredging sand out of the Mississippi River, and is the largest producer and dealer in building materials in the City of St. Louis; that it has an elevator plant at the foot of Tyler street, in said city, on the banks of the Mississippi River, at which point sand is elevated from barges into an elevator and loaded into cars
49 and thence shipped in cars to all points in the City of St. Louis; that this plant represents an investment of over Sixty Thousand Dollars ($60,000.00), and that it owns and operates 200 cars in connection with the operation of said plant. Petitioner says that it has, and maintains, a yard in the northwestern part of the city, for supplying sand to the northwestern part of the City of St. Louis, which plant is located on the Natural Bridge Road on the tracks of the Terminal Railroad Association, and which plant represents an investment of more than Twenty-five Thousand Dollars ($25,000.00). Petitioner also keeps and maintains a plant at Bremen Avenue, in the City of St. Louis, on the tracks of the Terminal Railroad Association, from which it supplies sand to the northern part of the City of St. Louis. This plant also represents a large investment.

Petitioner says that the elevating plant at Tyler Street, and the yard at Bremen Avenue are located on what was originally the Wiggins Ferry Company tracks and were so located when the Wiggins Ferry Company was an independent company and in no wise connected with the Terminal Railroad Association.

Petitioner says that during the year 1913 it shipped from the Tyler Street yards to the Natural Bridge Road yards, to the Bremen Avenue yards and to various industrial concerns located on the tracks of the Terminal Railroad Association, all in the City of St. Louis, 3,379 cars of sand. Petitioner says that all of said shipments so made by it during the year 1913 from the Tyler Street Elevator plant to the Natural Bridge Road yard, to the Bremen Avenue yard, and to said industrial plants, and amounting to 3,379 loaded cars, were shipments over the Terminal Railroad Association
50 of St. Louis, which were moved from the initial point, to-wit, the Tyler Street Elevator plant to the point of delivery, entirely over the rails and lines of the Terminal Railroad Association of St. Louis, each of said cars being as a matter of fact a movement from one point on the line of the Terminal Railroad to another point on the line of the Terminal Railroad, the entire movement from the initial point to the delivery point being on the tracks of the Terminal Railroad Association.

Petitioner says that there is no other available location to which it could remove its elevator plant which is now located at the foot of Tyler Street.

Petitioner says that on the 2nd day of March, 1914, in the above-entitled cause, this Court entered a final decree and that Section 1 on Page 2 of the said final decree reads as follows:

"The defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies, and from operating any of the properties belonging to it or its constituents, otherwise than as terminal facilities for the railroad companies using the same."

Said section of said decree further provides that the Terminal Railroad Association may continue as a lawful unification of terminal facilities "upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads." Peti-
51 tioner says that giving this language a literal construction the Terminal Association would thereby be enjoined and prohibited from performing the services for your petitioner above set forth, to-wit, from moving the products of its Tyler Street Elevator plant to the Natural Bridge Road plant, the Bremen Avenue plant, and the industrial plants located on the lines of the Terminal Railroad Association, for the reason that giving the language of the decree a literal construction such handling and moving of said cars from petitioner's Tyler Street plant is not "an interchange of traffic between railroads" and might be held and construed to be "the doing of business as railroad transportation."

Petitioner says that at no time did it have any knowledge or information that any such question was involved in this proceeding, or that any question of the legality of the movement of its traffic from one point on the Terminal Association tracks to another was involved, and that the first information it received as to the nature and terms of the final decree, as entered in said cause, was obtained from the public press which called attention to the same on or about the 1st or 2nd of April, 1914.

Petitioner says that a very grave and irreparable injury would be done to it if, by the terms of the decree entered in this cause, the Terminal Railroad Association were precluded and enjoined from continuing to move the products of its plant at Tyler Street to other points on the system of the Terminal Railroad Association, and especially to the points mentioned herein, to-wit, Bremen
52 Avenue, Natural Bridge Road yard, and industrial plants at other points on the system of the Terminal Association.

Petitioner says that it is informed that the Terminal Railroad Association has filed in the above-entitled proceeding a motion to modify Article 1 of the said final decree, and has attached to said motion an exhibit showing the various persons and corporations whose situation in regard to certain service over the Terminal Railroad Association is like unto that of your petitioner, and which exhibit shows the number of cars moved by the Terminal Association during the year 1913 for said various persons and corporations where the movement required like service to that hereinabove set forth as being done and required for your petitioner.

This exhibit shows that 521 industries, including this petitioner, are similarly situated on the lines of the Terminal Railroad Association, and that the total number of cars moved by the Terminal Railroad Association for these various industries from one point on its line to another point on its line, the entire service therefor being performed over the Terminal's own lines, for the year 1913 was 30,584 cars of which there were moved for petitioner 3379 loaded cars from the Tyler Street plant to the Natural Bridge Road yard, the Bremen Avenue yard, and to various industrial concerns located on the tracks of the Terminal Railroad Association in the City of St. Louis, in addition to which there were moved for your petitioner 805 loaded cars during the year 1913 by said Terminal Railroad Association from one point on the said Terminal line to other
53 points on the said Terminal line in East St. Louis, and making the entire number of loaded cars so moved for petitioner by the Terminal Railroad Association for the year 1913 4184 cars, and being about 14% of the total cars moved by the Terminal Railroad Association for the year 1913 for all parties similarly situated as was your petitioner; and petitioner says that none of said business embraced in the movement of said 4184 cars, so moved for it by the Terminal Railroad Association, was competitive with any railroad constituting one of the proprietary lines in said Terminal Railroad Association, or with any other railroad.

Wherefore, the premises considered, petitioner prays that the final decree heretofore entered in said cause may be so altered, amended or changed as not only to permit the Terminal Railroad Association to continue performing such services for your petitioner, by moving its said cars from one point on the lines of the Terminal Railroad Association to other points on the lines of the Terminal Railroad Association, even though the moving thereof from said initial point to said delivery point be entirely over the lines of the Terminal Railroad Association, but also petitioner prays that said decree may be made so clear and plain that petitioner and others similarly situated as is petitioner may be entitled to demand and require of the

Terminal Railroad Association the moving of cars from one point on the line of said Terminal Railroad Association to other points on the lines of said Terminal Railroad Association within what is known as the switching limits of St. Louis and East St. Louis, even though the moving of said cars be entirely over the lines of
54 the Terminal Railroad Association; and that petitioner and others similarly situated may be placed in a position where such duty on the part of the Terminal Railroad Association may be enforced by them, should such service be at any time declined or refused by said Association. And petitioner further prays that it may be permitted to appear by counsel and be heard on the proposed amendment or modification of said decree, either jointly with the hearing granted the Terminal Railroad Association, or at such other time and place as to the Court shall seem meet and proper.

UNION SAND & MATERIAL COMPANY,
By GEO. M. BLOCK, *Solicitor.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

On this 10th day of April, 1914, before me personally appeared H. L. Block, who, being first duly sworn, did say: I am President of the Union Sand & Material Company, and, as such, have personal knowledge of the matters and facts stated and set forth in the foregoing motion; and affiant says that the matters and facts stated and set forth in the foregoing motion are true.

H. L. BLOCK.

Subscribed and sworn to by H. L. Block before me this 10th day of April, 1914.

[SEAL.] EDITH FOSTER,
Notary Public.

My commission expires October 13, 1916.

Endorsed: Filed June 20, 1914. W. W. Nall, Clerk.

55 (*Supplemental Petitions of 53 Other Parties to Amend Final Decree.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Evens & Howard Fire Brick Co., Union Sand & Material Co., and Fifty-three Other Petitioners.

George M. Block and A. & J. F. Lee, Solicitors for Petitioners.

56 In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Evens & Howard Fire Brick Co., Union Sand & Material Co., and Fifty-three Other Petitioners.

Now come Hoyt Metal Co., and St. Louis Brewing Association, Heine Safety Boiler Co., Goffee & Carkener Co., Picker & Bearsdley Com. Co., Exchange Elevator, Terminal Elevator, Advance Elevator, Albers Com. Co., Barry Wehmiller Machinery Co., S. H. Bickley, Mound City Elevator, Langenberg Bros. Co., Tabeman Mackey Co., St. Louis Elevator & Grain Co., Laclede Steel Co., All Roofing Mfg. Co., East St. Louis Stone Co., Geo. S. Mepham & Co., Missouri Mallable Iron Co., Kettle River Co., Morris & Co., St. Louis Bed Mfg. Co., General Chemical Co., Commercial Acid Co., Elliot Frog & Switch Co., Indiahoma Refining Co., Commonwealth Steel Co., Frederick E. Rausch, M. W. Warren Coke Co., Interstate Scrap Iron Co., M. Cohen, Boecheler Lumber Co., Cohen-Schwartz Rail & Steel Co., L. J. Cohen & Co., National Enameling & Stamping Co., Granite City Steel Works, Christopher & Simpson Steel Works Co., G. Mathes Iron & Metal Co., Curtis & Co. Mfg. Co., Fayette R. Plumb (Inc.) Wrought Iron Range Co., E. E. Souther Iron Co., St. Louis Frog & Switch Co., Green's Car Wheel Mfg. Co., Jos. Greenspon's Sons Iron & Steel Co., Laclede Gas Light Co., Big Ben Quarry Co., Fruin-Colnon Contracting Co., Ralston Purina Co., Polar Wave Ice & Fuel Co., Granite Gas & Fuel Co., and Jos. Joseph & Bros. Co., and
57 state that they are corporations each organized and existing under the laws of one of the United States; that the Terminal Railroad Association of St. Louis is now engaged in moving loaded cars from one point on its line over its own rails exclusively, to another point on its line, carrying freight needed for the operation of their respective plants situated on said line at the date and to the number set after their respective signatures below under the words "No. of cars"; and that the movement of such loaded cars is necessary for the continuance of the business of these petitioners; that these petitioners hereby make, as their own, the statement of fact contained in the petitions of the Union Sand & Material Company and Evens & Howard Fire Brick Company, except in so far as the statements therein have peculiar reference to said two Companies.

These petitioners hereby offer to verify, by the affidavits of their respective officers, this petition if the Court shall desire that such verification be made.

These petitioners pray for the relief prayed for in such petitions of said Union Sand & Material Company and said Evens & Howard Fire Brick Company, and for such other and further relief as the Court may deem proper.

	Name of Petitioner.	No. of Cars.
	Hoyt Metal Co. by B. S. Thompson, Vice-Pres't	199
	St. Louis Brewing Ass'n, Henry Nicolaus, Pres't	141
	Heine Safety Boiler Co., by C. R. D. Meier	62
	Goffe & Carkener Co., G. C. Martin, Jr., Manager	88
	Picker & Brardsley Com. Co., per E. Picker	62
	Exchange Elevator	173
	Terminal Elevator	15
	Advance Elevator	7
	Albert Com. Co	37
	C. H. Alerbert Com. Co., Edw. M. Flesh, Pres't	——
58	Barry-Wehmiller Machinery Co., F. Latal, Sec'y	20
	S. H. Bickley	134
	Mound City Elevator, F. N. Young, Pres't	99
	Langenberg Bros. Co	61
	Taberman Mackey & Co	338
	St. Louis Elevator & Grain Co., Jacob Schreiner, Pres't	47
	Laclede Steel Co., Thomas R. Akin, Pres	407
	All Roofing Mfg. Co	6
	East St. Louis Stone Co., R. E. McLean, Mgr	572
	Geo. S. Mepham & Co	10
	Missouri Malleable Iron Co., F. E. Nulsen, Pres. & G. M	8
	Kettle River Co., per G. A. McLin	104
	Morris & Company, per C. Breinemann, A. T. M	24
	St. Louis Bed & Mfg. Co., Paul Schwaig	17
	General Chemical Co., M. A. Bruan, Supt	1
	Commercial Acid Co., A. E. Hopson, Supt	213
	Elliot Frog & Switch Co	61
	Commonwealth Steel Co., by Geo. K. Hoblitzelle, V. P	801
	Indiahoma Refining Co., By C. D. Martin, Pres	109
	Frederick E. Rausch	258
	M. W. Warren Coke Co., By P. H. Woods, Vice Pres	41
	Interstate Scrap Iron Co., by M. Cohen, Pres	145
	M. Cohen	51
	Boeckeler Lumber Co., by Henry A. Boeckeler, Pres't	77
	Cohen Schwartz Rail & Steel Co	563
	L. J. Cohen & Co	11
	National Enameling & Stamping Co., by Thos. K. Niedringhaus, Vice Pres	1,699
	Granite City Steel W'ks	1,351
	Christopher & Simpson Iron Works Co	52
	G. Mathes Iron & Metal Co., Jos. Mathes, Pres't	136
59	Curtis & Co. Mfg. Co., J. H. Steedman, V. Pres't	158
	Fayette R. Plumb, Inc., C. P. Bascom, Mgr	50
	Wrought Iron Range Co., B. B. Culver, Pres't	74
	E. E. Souther Iron Co., W. M. Scudder, V. Pres't	83
	St. Louis Frog & Switch Co., R. E. Einstein, Sec'y	77
	Green's Car Wheel Mfg. Co., Geo. F. Cottrill, Sec'y	30
	Jos. Greenspons Son Iron & Steel Co., per Louis Greenspons, Pres.	127
	The Laclede Gas Light Company, C. L. Holman, Pres	342

Big Bend Quarry Co., By M. Skuinka, Sec'y & Treas.....	346
Fruin Colnon Contracting Co., By B. S. Colnon, Pres't.....	40
Ralston Purina Co., Wm. H. Danforth, Pres't.....	53
Polar Wave Ice & Fuel Co., By C. W. Whitelaw, Pres't.....	523
Granite City Gas & Fuel Co., Thos. L. Niedringhaus, Pres't..	226
The Jos. Joseph & Bros. Co.....	14

Endorsed: Filed June 20th, 1914. W. W. Nall, Clerk.

60 *(Order Denying Petitions of Evans & Howard Fire Brick Co. and Others for Leave to Intervene in the Cause.)*

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

UNITED STATES OF AMERICA, Complainant,
vs.
THE ST. LOUIS TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants.

Now come the Evens & Howard Fire Brick Company, the Union Sand & Material Company, and the fifty-three other parties whose supplemental petitions hereto attached are presented to the Court & which petitions were filed with the Court on April 12, 1914, and they ask leave to file said petitions in this court, to which the counsel of the United States in open court objects and thereupon leave is granted by the court to said petitioners to file their said petitions and supplemental petitions, this 20th day of June 1914. Which is accordin-ly done. But the prayers of the petitioners for leave to intervene are hereby denied. The petitioners excepted to this denial. Request for stay denied to which petitioners also excepted. Counsel for the United States, excepted to leave for the petitioners to file their petitions.

WALTER H. SANBORN,
WILLIAM C. HOOK,
WALTER I. SMITH,
Circuit Judges.

Endorsed: Filed June 20th, 1914. W. W. Nall, Clerk.

61 (*Petition of Evens & Howard Fire Brick Co. et al. for Appeal.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Union Sand & Material Company and Evens & Howard Fire Brick Company, Interveners.

Petition for Appeal.

The above named petitioners, Union Sand & Material Company and Evens & Howard Fire Brick Company, conceiving themselves aggrieved by the decree and order made and entered on the 20th day of June A. D. 1914, — the above entitled cause, denying the prayers of their petitions filed in said cause praying for a modification of the final decree made in the above entitled cause, do hereby appeal from said order so made and entered on the 20th day of June 1914, to the Supreme Court of the United States, for the reason specified in the assignments of error which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record of proceedings and papers, together with the certified copy of said final decree upon which said order of June 20th, 1914, and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN F. LEE,
GEO. M. BLOCK,
Attorneys for Petitioners.

Dated June 20, 1914.

Endorsed: Filed June 20th, 1914. W. W. Nall, Clerk.

62 (*Assignment of Errors Filed by Evens & Howard Fire Brick Co. et al.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Union Sand & Material Company and Evens & Howard Fire Brick Company, Intervenors, Petitioners.

Now come the above named petitioners, Union Sand & Material Company and Evens & Howard Fire Brick Company, and file the following assignment of errors upon which they rely in their appeal

from the order and decree made by this Honorable Court on the 20th day of June A. D. 1914, denying the prayers of their petitions praying a modification of the final decree heretofore entered in this cause, and say that there is manifest error in the record of proceedings herein and in said order entered herein in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and that the court erred therein in the following particulars, to-wit:

1st. Petitioners assign as error the action of the court in denying the prayers of the petitioners set forth in their petitions filed herein for the modification of the final decree entered in this cause. And in order that the foregoing assignments of error may appear of record the said petitioners present the same to the court and pray that such disposition may be made *therewith* as is in accordance with law and the statutes of the United States in such case made and provided, and petitioners pray for a reversal of said order denying the prayers of the petition-s in their petitions set forth and filed in the said cause.

63

JOHN F. LEE,
GEO. M. BLOCK,
Attorneys for Petitioners.

Dated June 20, 1914.

Endorsed: Filed June 20th, 1914, W. W. Nall, Clerk.

64 (*Order Granting Appeal to Evens & Howard Fire Brick Co. et al.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al.

Order.

The foregoing petition asking for an appeal in this case to the Union Sand & Material Co. & Evans & Howard Fire Brick Co., is hereby granted.

To which petition the counsel for the United States, objected at the time the same was presented, and to the order allowing the same, the counsel for the United States excepted, in open court.

WALTER H. SANBORN,
WILLIAM C. HOOK,
WALTER I. SMITH,
Circuit Judge.

Dated June 20, 1914.

Endorsed: Filed June 20th, 1914, W. W. Nall, Clerk.

65 (*Appeal Bond of Evens & Howard Fire Brick Co. et al.*)

Know all men by these presents: that we John F. Lee and Geo. M. Block do hereby agree and bind ourselves, our heirs & legal representatives unto the United States of America in the sum of Five Hundred Dollars well and truly to be paid upon condition that whereas an appeal has been granted to the Union Sand & Material Co. & Evens & Howard Fire Brick Co. from an order denying the petitions of said Union Sand & Material Co. & Evens & Howard Fire Brick Co. to amend the final decree in the case of United States of America vs. Terminal Railroad Ass'n et al. in the District Court of the United States for the Eastern Division of the Eastern District of Missouri now therefore if said appeal be prosecuted with effect & the above obligors shall pay all costs which may be assessed against said Union Sand & Material Co. & Evens & Howard Fire Brick Co. this undertaking shall be void; else to remain in full force & effect. Sealed & delivered in presence of

GEO. M. BLOCK. [SEAL.]
JOHN F. LEE. [SEAL.]

This undertaking and the security furnished thereby is hereby approved.

WALTER H. SANBORN,
WALTER I. SMITH,
WILLIAM C. HOOK,
Circuit Judges.

Endorsed: Filed June 20th, 1914, W. W. Nall, Clerk.

66 (*Election Filed by Evens & Howard Fire Brick Co. et al.*)

Intervening Petitioners' Election as to Printing Record.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al., Defendants; Union Sand & Material Company and Evens & Howard Fire Brick Company, Intervening Petitioners.

Intervening Petitioners' Election as to Printing Record.

Now come the Evens & Howard Fire Brick Company and the Union Sand & Material Company—intervenors and appellants in the above-entitled cause—and elect to have a full and complete typewritten transcript of the record and proceedings in the above-entitled

cause to be printed by, and under the supervision of, the Clerk of the United States Supreme Court.

JOHN F. LEE,
GEO. M. BLOCK,
Attorneys for Evens & Howard Fire Brick Co. and Union Sand & Material Company.

Endorsed: Filed June 23rd, 1914, W. W. Nall, Clerk.

67 (*Assignment of Errors. Filed by Complainant Mar. 27th, 1914.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Complainant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ST. LOUIS Merchants' Bridge Terminal Railway Company, Wiggins Ferry Company, St. Louis Bridge Company, St. Louis Merchants' Bridge Company, Missouri, Kansas & Texas Railway Company, St. Louis & San Francisco Railway Company, The Chicago & Alton Railway Company, Baltimore & Ohio Southwestern Railroad Company, Illinois Central Railroad Company, St. Louis, Iron Mountain & Southern Railway Company, Chicago, Burlington & Quincy Railway Company, St. Louis, Vandalia & Terre Haute Railroad Company, The Wabash Railroad Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Louisville & Nashville Railroad Company, Southern Railway Company, The Chicago, Rock Island & Pacific Railway Company, The Missouri Pacific Railway Company, Central Trust Company of New York, A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. E. Schaff, T. C. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher, and S. D. Webster, Defendants.

Now comes the complainant above named and files the following assignment of errors upon which it will rely in its appeal from the decree made by this Honorable Court on the second day of March, 1914, in the above entitled cause, and says that there is manifest error in the record of proceedings herein and in said final decree entered herein in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and that
68 the court erred therein in the following particulars, to-wit:—

I.

The complainant assigns as error the action of the court in denying the application and motion of the complainant to enter the interlocutory decree asked by the complainant.

II.

The complainant assigns as error the failure and refusal of the court upon the record in this cause to enter an interlocutory decree in accordance with the opinion of the Supreme Court directing the complainant and the defendants herein to submit to the court within ninety days after the receipt of the mandate of the Supreme Court herein a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Railroad Association of St. Louis, Missouri, which plan should eliminate the violation of law pointed out by the Supreme Court as being a combination made by defendants within the inhibition of the act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopoly."

III.

The complainant assigns as error the failure and refusal of the court upon the record in this case to enter a final decree in accordance with the opinion of the Supreme Court effectively prohibiting the continuance of the combination, conspiracy and restraint of trade and commerce among the several states, as described in the complaint filed in this suit and found to exist by the Supreme Court and which said combination the Supreme Court decided was in violation of the act of Congress of July 2, 1890, to protect trade and commerce against restraint and monopoly.

IV.

The complainant assigns as error the failure and refusal of the court in denying the application and motion of the complainant to enter the final decree in the form as submitted and asked by the complainant.

V.

The complainant assigns as error the failure and refusal of the court to direct the defendants herein to act in connection
69 with the complainant in submitting to the court within ninety days after the receipt of the mandate in this case a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company so that the organization of the defendants and the operation of their properties and the contracts between defendants would cease to be in violation of the inhibition of the act of Congress of July 2, 1890.

VI.

The complainant assigns as error the entry by the court of the final decree in this case as made and filed the second of March, 1914, in the office of the clerk of the District Court of the United States in

and for the Eastern Division of the Eastern Judicial District of Missouri, because said final decree as entered is not in accordance with the opinion of the Supreme Court heretofore rendered in this cause, and does not effectively carry out the mandate of the Supreme Court so as to prevent the continuance by the defendants of the violation of the Act of Congress against restraint of trade and monopoly of July 2, 1890.

VII.

The complainant assigns as error the failure of the court to provide in its final decree the exact form and conditions of a contract which should be executed between the defendants and a company or companies asking either joint use or joint ownership of the terminal facilities controlled by the defendants.

VIII.

The complainant assigns as error the failure of the court to designate specifically in its final decree what contracts should have stricken out of them the portions thereof ordered eliminated by the opinion and mandate of the Supreme Court.

IX.

The complainant assigns as error the action of the court in placing in its final decree the precise words, without more, of the fifth paragraph of the Supreme Court's order relating to the arbitrary charge in respect of traffic originating within the one-hundred mile
70 area, because to merely put the precise words of the fifth paragraph in the decree without more does not end litigation but establishes a starting point for further controversy.

X.

The complainant assigns as error the action of the court in entering a final decree herein permitting the defendants to continue the existing organization of the Terminal Company and the combination for the operation between the Terminal Company and the Wiggins Ferry Company and the Merchants Company and the several companies related to these above named corporations, after the complainant and the defendants had failed to come to an agreement in substantial accord with the opinion and decree of the Supreme Court because the order of the Supreme Court provided for a dissolution and not a continuance of the combination between said three above named corporations, the Wiggins, Terminal and Merchants Companies, upon the failure of the parties complainant and defendants to come to an agreement in accordance with the opinion of the Supreme Court and its decree.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays that such disposition be made therewith as is in accord-

ance with law and the statutes of the United States in such case made and provided, and complainant prays a reversal of said decretal order and decree made and entered by said court and a decree entered in accordance with the directions contained in the decree of reversal of this cause by the Supreme Court of the United States and its opinion filed with the latter decree.

(Signed) EDWARD C. CROW,
Special Assistant to the Attorney General.

Endorsed: Filed March 27th 1914, W. W. Nall, Clerk.

71 (*Petition for Appeal. Filed by Complainant Mar. 27th, 1914.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, Complainant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ST. LOUIS MERchants' Bridge Terminal Railway Company, Wiggins Ferry Company, St. Louis Bridge Company, St. Louis Merchants' Bridge Company, Missouri, Kansas & Texas Railway Company, St. Louis & San Francisco Railway Company, The Chicago & Alton Railway Company, Baltimore & Ohio Southwestern Railroad Company, Illinois Central Railroad Company, St. Louis, Iron Mountain & Southern Railway Company, Chicago, Burlington & Quincy Railway Company, St. Louis, Vandalia & Terre Haute Railroad Company, The Wabash Railroad Company, Louisville & Nashville Railroad Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, The Missouri Pacific Railway Company, Southern Railway Company, Central Trust Company of New York, The Chicago, Rock Island & Pacific Railway Company, A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. F. Schaff, T. C. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher, and S. D. Webster, Defendants.

The above named complainant conceiving itself aggrieved by the decree made and entered on the second day of March, 1914, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said order and degree was made, duly authenticated, may be sent to the Supreme Court of the United States

72 (Signed) EDWARD C. CROW,
Special Assistant to the Attorney General.

——— ———,
Special Assistant to the Attorney General.

Dated at St. Louis, Missouri, March 27, 1914.

The foregoing petition for appeal is granted and the claim of appeal therein made is allowed.

Done in open court this 27th day of March, 1914.

(Signed) WALTER H. SANBORN,
Senior Circuit Judge.

Endorsed: Filed March 27th, 1914. W. W. Nall, Clerk.

73 (*Clerk's Certificate.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

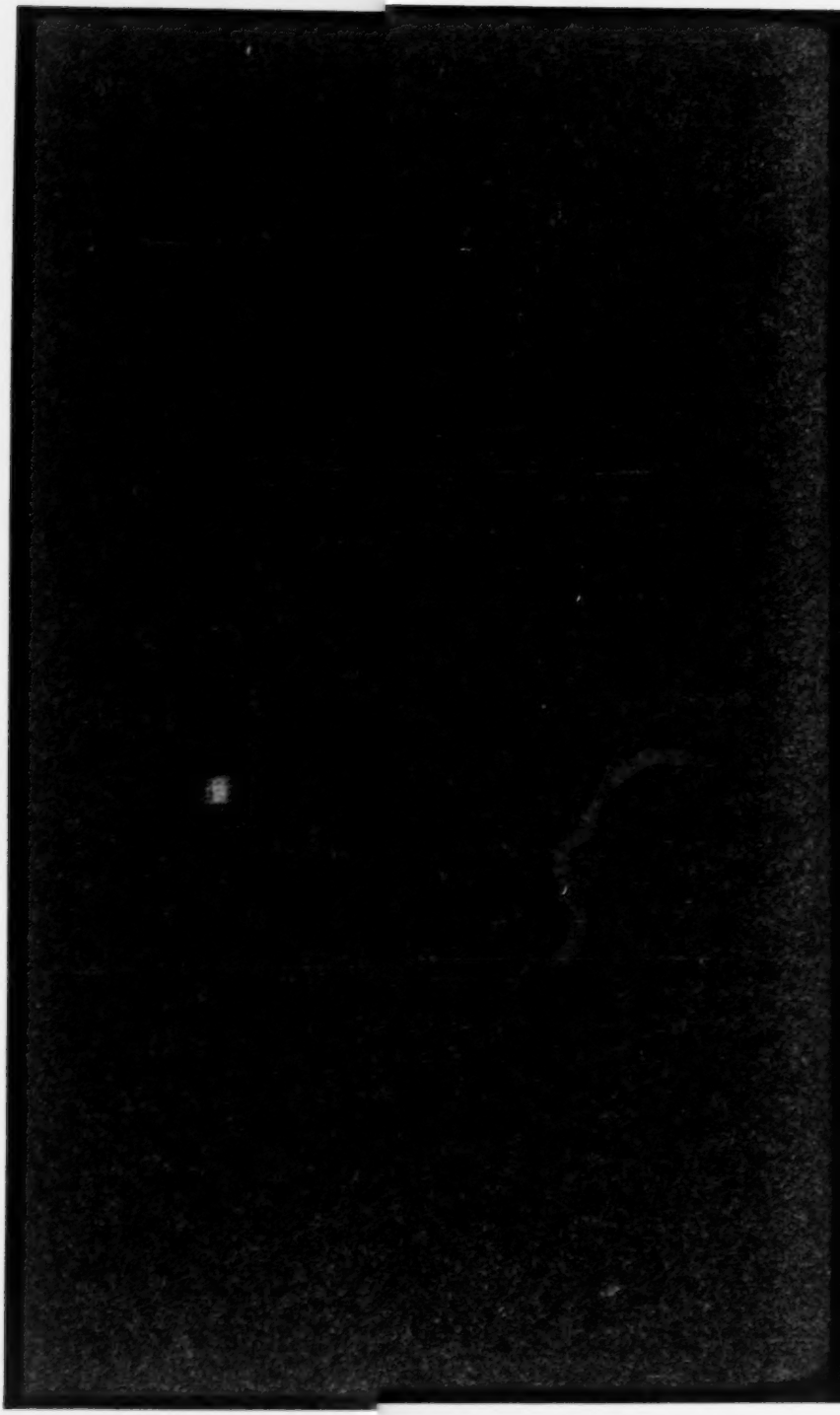
I, W. W. Nall, Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, upon the appeal taken by the Evens & Howard Fire Brick Company and the Union Sand & Material Company, intervening petitioners, in the cause No. 5250, entitled United States of America, complainant, versus Terminal Railroad Association of St. Louis, et al., defendants, (save as restricted by the præcipes of the said petitioners and of the United States of America hereinbefore set forth), together with all things of and concerning the same, as fully as the same remain on file and of record in said cause in my office; and that the original Citation is hereto attached and herewith returned.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court, at office in the City of St. Louis, this 11th day of July 1914.

[Seal of the United States District Court, Eastern Division of the Eastern Judicial District of Missouri.]

W. W. NALL,
Clerk of said District Court.

Endorsed on cover: File No. 24,311. E. Missouri D. C. U. S. Term No. 567. Evens and Howard Fire Brick Company and Union Sand and Material Company, appellants, vs. The United States. Filed July 15, 1914. File No. 24,311.



In the Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS AND HOWARD FIRE BRICK COMPANY and Union Land and Material Company, appellants,
v.
THE UNITED STATES.
No. 567.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

The Solicitor General on behalf of the United States respectfully moves that this appeal be dismissed.

The appeal is from an order of the United States District Court for the Eastern District of Missouri, entered June 20, 1914, denying the petitions of the appellants for leave to intervene and for a modification of the final decree theretofore entered by that court in the case of *United States* v. *Terminal Railroad Association of St. Louis et al.*, a suit under the antitrust act of July 2, 1890. (R. 31.)

The petitions in question were filed on June 20, 1914. (R. 21–28.) Long prior to that date, to wit,

on March 27, 1914, the United States had duly perfected an appeal to this court from the aforesaid final decree, assigning as error the failure of the District Court properly to carry out the opinion and mandate handed down by this court at the October Term, 1911. (R. 35-39.)

It is thus apparent on the face of the record that at the time appellants' petitions were filed the District Court was wholly without power or authority to make any order affecting or modifying the decree, for the reason that the jurisdiction of this court had attached and become exclusive through the perfecting of an appeal by the United States.

That the jurisdiction of an appellate court becomes complete and that of the trial court ceases at the time an appeal or writ of error is perfected, is elementary. *Bronson* v. *La Crosse R. R. Co.*, 1 Wall. 405, 409; *Brooks* v. *Norris*, 11 How. 203; *Keyser* v. *Farr*, 105 U. S. 265; *The "S. S. Osborne,"* 105 U. S. 447, 450; *Ensminger* v. *Powers*, 108 U. S. 292; *Roemer* v. *Simon*, 91 U. S. 149; *Hovey* v. *McDonald*, 109 U. S. 150, 157; *Burnham* v. *North Chicago Street Ry. Co.*, (C. C. A. 7th C.), 87 Fed. 168; *Morrin* v. *Lawler*, (C. C. E. D. N. Y.), 91 Fed. 693. Therefore after a writ of error or appeal has been perfected the lower court is without power to modify its judgment or decree.

In *Roemer* v. *Simon*, 91 U. S. 149, the Chief Justice, in denying a motion, made after an appeal had been taken to this court, to set aside the decree

of the court below and grant a rehearing, said (p. 150):

> * * * It would be useless to remand this cause, * * * as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing *and have that court send to us a request for a return of the record, in order that it might proceed further with the cause.* Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order. * * * (Italics ours.)

In *Ensminger* v. *Powers,* 108 U. S. 292, in deciding that the period during which an appeal was pending in this court should not be counted against the appellant in ascertaining whether her bill of review was filed in time, this court said (p. 302):

> * * * The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged. * * * *While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control.* (Italics ours.)

In *Citizens' Bank of Wichita* v. *Farwell,* 56 Fed. 539, the Circuit Court of Appeals for the Eighth Circuit, in dismissing a writ of error sued out to

review an order of the trial court overruling a motion to set aside the judgment while a previous writ of error was pending, said:

> * * * The removal of the case into this court under the first writ of error transferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court over the case was at an end.

In *First National Bank* v. *State National Bank* (C. C. A. 9th C.), 131 Fed. 430, the court said (p. 431):

> * * * The overwhelming weight of authority of the State courts is that an appeal, properly perfected, absolutely removes the case from the trial court and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It can not very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction.

In *Morrin* v. *Lawler* (C. C. E. D. N. Y.), 91 Fed. 693, it was said (p. 694):

> * * * When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained.

See, also, *Morgan's Louisiana & T. R. & S. S. Co.* v. *Texas Cent. Ry. Co.* (C. C. Tex.), 32 Fed. 525, 530 (opinion by Mr. Justice Harlan); and *Kimberly* v. *Arms* (C. C. Ohio), 40 Fed. 548, 550.

Further, the case in which the final decree sought to be modified was rendered, namely, *United States* v. *Terminal Railroad Association of St. Louis et al.*, is now pending in this court, being No. 452, October Term, 1914; and therefore, if the ends of justice require their presence, this court under section 5 of the antitrust act has full power to permit or order the appellants to appear and be heard on any question affecting their rights.

Wherefore it is submitted that it is apparent on the face of the record that this appeal is irregular, frivolous, and useless and should be dismissed.

JOHN W. DAVIS,
Solicitor General,
EDWARD C. CROW,
Special Assistant to the Attorney General.

SEPTEMBER, 1914.

O

Supreme Court, U. S.
FILED
OCT 12 1914
JAMES D. MAHER
CLERK

No. 567.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

EVANS AND HOWARD FIRE BRICK COMPANY, AND UNION SAND & MATERIAL COMPANY, APPELLANTS

vs.

THE UNITED STATES, RESPONDENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS ON MOTION OF UNITED STATES TO DISMISS THEIR INTERVENING PETITIONS.

GEORGE M. BLOCK,
JOHN F. LEE,
Solicitors for Appellants.

No. 567.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

EVANS AND HOWARD FIRE BRICK COMPANY AND UNION SAND AND MATERIAL COMPANY, APPELLANTS

vs.

THE UNITED STATES, RESPONDENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS ON MOTION OF UNITED STATES TO DISMISS THEIR INTERVENING PETITIONS.

These appellants, in answer to the motion to dismiss filed herein, state that their appeal is not "irregular, frivolous or useless," as stated in said motion, and ought not to be dismissed as prayed therein. That the

District Court, from which the appeal herein is taken, erred in refusing to permit appellants to intervene in said Court in the above entitled cause for the reasons stated in points 1, 2 and 3 of the statement, brief and argument of appellants filed in this court and set forth respectively on pages 16, 18 and 21 of their said statement, brief and argument filed herein, and that these appellants were entitled to intervene in said District Court in said cause because

First. Rule 37 of this Court provides in part, as follows:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention."

Second. Section 5 of the Anti-Trust Act of the United States provides in part, as follows:

> "Whenever it shall appear to the Court before which any proceeding under Section 4 of this Act may be pending that the ends of justice require that other parties should be brought before the Court, the Court may cause them to be summoned."

Said appellants aver that if they had no right to intervene in said District Court, either under said Rule 37 or said Section 5, they have a right under both said rule and said section to appear and be made parties to this cause if this Court shall so order. That even if the foregoing were not true, this Court will recognize that the appellants and the fifty-three other intervenors who appeared with them in the District Court, and who sought the same relief sought by these appellants, constitute a portion of the public vitally interested

in the decree rendered in the cause of United States against the St. Louis Terminal Association, but not made parties in that cause or in any default in attempting to secure a correction of said decree and are therefore entitled to appear and be heard in this Court, by counsel as amici curiae.

Respectfully submitted,

Thomas Bond

John F. Lee

Solicitors of said Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,

Appellants,

vs.

THE UNITED STATES.

No. 567.

MOTION OF EVENS & HOWARD FIRE BRICK COMPANY AND UNION SAND & MATERIAL COMPANY TO CONSOLIDATE CAUSE No. 567 AND CAUSE No. 572 WITH CAUSE No. 452, AND TO ADVANCE HEARING OF No. 567 AND No. 572, TO BE HEARD CONJOINTLY WITH No. 452.

JOHN F. LEE,
GEORGE M. BLOCK,
Solicitors for Evens & Howard Fire Brick Company and Union Sand and Material Company, Appellants.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1513.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants,
vs.
THE UNITED STATES.
No. 567.

NOTICE.

To the United States of America and to the Terminal Railroad Association of St. Louis:

You will take notice that on the 12th day of October, 1914, the Evens & Howard Fire Brick Company and the Union Sand & Material Company will file with, and present to, the Supreme Court of the United States a motion to consolidate the appeals in Cause No. 572 to the October Term, 1914, and Cause No. 567 to the Oc-

tober Term, 1914, with Cause No. 452 to the October Term, 1914, and to advance said Cause No. 567 and said Cause No. 572 so that all three appeals may be heard jointly on the 12th day of October, 1914.

John F. Lee

Lee & Black

Solicitors for Evens & Howard Fire Brick Company and Union Sand & Material Company.

Service of the foregoing notice, with a copy of the motion to consolidate and advance, and the argument in support thereof, is hereby acknowledged, this..... day of September, 1914.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants,
vs.
THE UNITED STATES.
No. 567.

MOTION OF EVENS & HOWARD FIRE BRICK COMPANY AND UNION SAND & MATERIAL COMPANY TO CONSOLIDATE CAUSE No. 567 AND CAUSE No. 572 WITH CAUSE No. 452, AND TO ADVANCE HEARING OF No. 567 AND No. 572, TO BE HEARD CONJOINTLY WITH No. 452.

Now comes Evens & Howard Fire Brick Company and Union Sand & Material Company and show to the Court that on April 22, 1912, this Court rendered an opinion

in case of United States of America, appellant, v. Terminal Railroad Association of St. Louis *et al.*, which opinion is reported in 224 U. S. Supreme Court Reports, page 383; that pursuant to the opinion and mandate of this Court, the Circuit Judges of the Eighth Circuit, sitting in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, did, on the 2nd day of March, 1914, enter a final decree in said cause; that on the 27th day of March, 1914, the United States of America took an appeal in said cause for the purpose of obtaining a change and modification of said final decree, alleging in its assignment of errors that said decree as entered was not in accordance with the opinion rendered by this Court on April 22, 1912; that the appeal taken by the United States of America was docketed in this court and numbered "1023" to the October Term, 1913, but is now numbered 452 to October Term, 1914, and has been advanced and set for hearing on the 13th day of October, 1914, in this court; that on the 28th day of March, 1914, the Terminal Railroad Association of St. Louis, defendant, filed a motion in said cause to modify said final decree, which motion was overruled, and on the 20th day of June, 1914, the said Terminal Railroad Association appealed from the order of the District Court overruling said motion to modify said final decree to this Court; that said appeal has been perfected, said cause has been docketed, and is numbered Cause No.

572 to the October Term of this Court; that on the 12th day of April, 1914, the Evens & Howard Fire Brick Company and the Union Sand & Material Company filed a motion in said cause asking leave to intervene and praying a modification of said final decree, and on June 20, 1914, said petition and motion was by the said District Court denied, and the relief therein prayed refused; whereupon, petitioners, Evens & Howard Fire Brick Company and Union Sand & Material Company, duly perfected their appeal to this Court and said appeal has been docketed in this Court and is numbered Cause No. 567 to the October Term of this Court. Petitioners state that the counsel for the Terminal Railroad Association have notified counsel for petitioners that it is their intention to move this Court that its appeal—being Cause No. 572 to the October Term, 1914, of this Court—be consolidated with Cause No. 452 to the October Term, 1914, of this Court—being the appeal of the United States in the same cause; and that the appeal taken by petitioners—being Cause No. 567 to the October Term, 1914—be also consolidated with said Cause No. 572 and said Cause No. 452 to the end that all questions involved in said three appeals may be settled and adjudicated at one and the same time.

Wherefore, the premises considered, the Evens & Howard Fire Brick Company and the Union Sand & Material Company do hereby move this Court that an order be entered herein consolidating said Cause No. 567

to the October Term, 1914, and said Cause No. 572 to the October Term, 1914, with said Cause No. 452 to the October Term, 1914, and that said Causes No. 567 and 572 be advanced and set for hearing and argument on the 13th day of October, 1914, the day on which Cause No. 452 is set for hearing; and, for the grounds of this motion, the Evens & Howard Fire Brick Company and the Union Sand & Material Company say that all three of said appeals involve the interpretation and construction of the decision of this Court, rendered in the case of United States of America, Appellant, v. Terminal Railroad Association of St. Louis *et al.*, on the 22nd day of April, 1912; that all three of these causes involve the determination of the correct meaning of said decision and as to whether or not the final decree entered in said cause by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri has complied with the mandate and decree of this Court; that each of the appellants in said three causes is contending for a different construction as to the correct meaning of said decision of this Court, and that each of said appellants is seeking a modification of said final decree in some particular vitally affecting its interests and directly at variance with the form of the decree as contended for by the other appellants; that any ruling made by this Court upon any one of said appeals without giving the other appellants an opportunity to be heard might work a great injustice and

wrong to the appellant not so heard; that the questions involved in said three appeals are so intimately connected and so intimately involved one with the other that it is essential to right and justice that said three appeals be heard at one and the same time; that it will lessen the work and labor of this Court if said appeals be consolidated and heard at one time, and such consolidation will greatly aid and assist this Court in the discharge of its work and labor in connection with the decision of the questions involved in said three appeals, and appellants respectfully state to the Court that a copy of this notice and motion has been duly served upon the counsel representing all of the adverse parties.

Respectfully submitted,

John F. Lee

Solicitors for Evens & Howard Fire Brick Co. and Union Sand & Material Co., Appellants.

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED
SEP 17 1914
JAMES D. MAHER
C. F.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants,
vs.
THE UNITED STATES.
No. 567.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS.

JOHN F. LEE,
GEORGE M. BLOCK,
Solicitors for Appellants.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants.

vs.

THE UNITED STATES.

No. 567.

STATEMENT.

On April 22, 1912, this Court rendered an opinion in the case of United States of America, appellant, v. Terminal Railroad Association of St. Louis *et al.*, defendants, which opinion is reported in 224 U. S. Supreme Court Reports, page 383. Pursuant to the opinion and mandate of this Court, the Circuit Judges of the Eighth Circuit, sitting in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, did, on the 2nd day of March, 1914, enter a final decree in said cause. On the 12th day of April, 1914, appellants filed a motion in said cause ask-

ing leave to intervene and praying a modification of said final decree, thereafter fifty-three other parties, similarly situated as are appellants, and with the same rights involved, also filed supplemental petitions asking leave to intervene in said proceeding. On June 20, 1914, the said Circuit Judges, sitting as a District Court in said original cause, entered an order, under and by the terms of which appellants were granted leave to file their intervening petitions and leave was also granted to file the supplemental petitions of said fifty-three other interveners, but the prayers of the appellants and of said supplemental petitioners for leave to intervene and for the relief prayed therein were, by said order, denied, to which order denying appellants the right to intervene and denying the relief prayed for, appellants duly excepted, and this appeal is taken from said order of the District Court, so entered on the 20th day of June, 1914.

In said original cause—United States of America, complainant, v. Terminal Railroad Association of St. Louis *et al.*, defendants—the United States of America took an appeal to this Court on the 27th day of March, 1914, the purpose of said appeal, according to the assignment of errors, being to obtain a modification and change of the terms of the said original decree; and, on the 28th day of March, 1914, the Terminal Railroad Association of St. Louis filed its motion in said original cause, praying for a modification of said decree, which

motion was, on the 20th day of June, 1914, denied, and on the 20th day of June, 1914, the Terminal Railroad Association of St. Louis also took an appeal in said original cause to this Court from the order of the District Court denying its motion to modify said final decree. The appeal of the United States of America, taken on the 27th day of March, 1914, in said cause, has been advanced and, by order of this Court, the hearing of this appeal has been set for the 13th day of October, 1914. Motions have been made by these appellants and the Terminal Railroad Association of St. Louis to consolidate this appeal of the Evens & Howard Fire Brick Company and the Union Sand & Material Company, and the appeal of the Terminal Railroad Association of St. Louis, with the said appeal of the United States of America, and to advance the hearing of the appeal of the Evens & Howard Fire Brick Company and the Union Sand & Material Company and the Terminal Railroad Association so that the same may be heard by this Court on the 13th day of October, 1914, at the same time that the appeal of the United States of America heretofore taken in the same cause is heard by this Court.

The relief prayed for by appellants is a modification of the original decree, entered in said original cause, which will "permit the Terminal Railroad Association of St. Louis to receive and transport from any person, firm or corporation cars, loaded or unloaded, at any

point, on its terminal lines and move same to any other point on its said terminal lines and there deliver same to any person, firm or corporation, even though the moving thereof from said initial point to said delivery point be entirely over the lines of the Terminal Railroad Association".

The Terminal Railroad Association of St. Louis is an organization composed of substantially all the terminal units which formerly supplied terminal and switching facilities to the City of St. Louis. The history of its organization is so fully set out in the opinion rendered by this Court in United States v. Terminal Railroad Association, 224 U. S. 383 (56 Law Ed. 810), and this Court is so familiar with the history of the organization that we simply refer to that opinion for the details of such organization. At the present time said Terminal Association embraces by far the greater portion of the terminal facilities which supply terminal and switching facilities to the City of St. Louis. Many of the constituent units which go to form the present Terminal Association consist of terminal railroads organized under the general railroad laws of the State of Missouri. (See 224 U. S., *l. c.* 407, and State *ex inf.* v. Terminal Railroad, 182 Mo., *l. c.* 293.) In addition, many, if not all, of the constituent units which compose the Terminal Association obtained their rights over the streets of the City of St. Louis under ordinance grants which impose contractual obligations upon them of the following na-

ture, for instance: The St. Louis Transfer Railway,—one of such constituent units,—obtained its rights over the streets of the City of St. Louis under Ordinance No. 12975, approved June 11, 1884, Section 2 of which ordinance provides as follows:

> "That said St. Louis Transfer Railway Company **shall transfer and switch, or pull to or from any transfer boat, and connecting lines and switches,** cars for all persons and companies along the line hereby authorized, at equal rates, **and its charges** for switching, including such pulling to and from said boats and connecting lines and switches and return of all empty cars, **shall not exceed one dollar per car** over any portion of the route between Arsenal street and the switches of the St. Louis Water Works."

And the St. Louis Merchants Bridge Terminal Railway Company, another constituent unit of said association, obtained its right to operate over the streets of the City of St. Louis under Ordinance No. 14078, approved July 9, 1887, which ordinance in Section 6 thereof provides as follows:

> "The said St. Louis Merchants Bridge Terminal Railway Company, its successors or assigns, **shall receive from any other railroad company, persons, firm or corporation and deliver to any other railway company, person, firm or corporation that shall hereafter have connection with its tracks,** within the City of St. Louis, including the return of the

empty cars free of charge, **any and all cars loaded**; and also shall receive from any railway company, person, firm or corporation that shall hereafter have connection with its tracks, within the City of St. Louis, including the return of the empty cars free of charge, and deliver the cars to any other railway company, person, firm or corporation that shall hereafter have connection with its tracks, including the return of the empty cars free of charge; as also to receive in carload lots of freight from any person, firm or corporation that shall hereafter have connection with its tracks, and transfer the car to any person, firm or corporation that shall hereafter have connection with its tracks, including the return of the empty cars free of charge; **for which service it may charge therefor a sum of money not to exceed one dollar for each car so transported** to any station, initial or terminal point on the line of its railway within the limits of the City of St. Louis. * * *"

The Terminal Association has established and maintains what is known as "switching limits at East St. Louis and St. Louis", being the territory covered by its lines, within which it has always moved cars from any one point to any other point on its lines as a switching service. A map of this "switching limit" is herewith filed showing all lines of the Terminal Association marked thereon in red, and also showing all industrial plants located thereon at time the map was published.

The tracks of the Terminal Association cover an area of about one hundred square miles, and while its main

business is that of furnishing terminal facilities to the proprietary railroad lines, yet incidental to that, ever since its organization it has been furnishing switching facilities to the business industries which are located at various points in and about the City of St. Louis on its various lines, or at any point on the lines within said "switching limits", which service has always consisted of moving cars from the plant of any such industry to some other plant of the same industry, or to some customer of such industry located in said "switching limits". Depending upon such service, an immense number of industries have been located upon the lines of the Terminal Association at various points in the City of St. Louis and elsewhere in said "switching limits", all of which industries are wholly dependent in many instances upon the Terminal Association for the movement of its products from the manufacturing or producing plant of such industry to other plants of the same industry or to its various customers, likewise located upon the tracks of the Terminal Association; and, in many cases, the location of the industries is such that the movement of the product of the industry to its other plant or to its customer is wholly over the tracks of the Terminal Association. During the year 1913 there were five hundred twenty-one industries so located on the tracks of the Terminal Association who shipped during the year 1913 over thirty thousand loaded cars to various other plants, persons and industries also located on

the lines of the Terminal Railroad Association where the movement of the cars was entirely over the lines of the Terminal Association; but the movement of these thirty thousand loaded cars, while entirely over the lines of the Terminal Association, was not competitive with any railroad constituting one of the proprietary lines in said Terminal Association nor was it competitive with any other railroad. In addition to this, the movement of these thirty thousand loaded cars was entirely intrastate. (See Record No. 567, pp. 23, 24 and 27 and see Record No. 572, pp. 24 to 32.)

The Evens & Howard Fire Brick Company has erected a plant at the cost of half a million dollars, for the manufacture of fire brick and other kindred products, on the line of the Terminal Railroad Association, where it employs a large number of persons. About five miles distant on the line of said Terminal Association it has opened clay banks from which it obtains its entire supply of clay with which to operate its plant, and owns its own cars in which to carry the clay from said mine to said plant. The Terminal Association is moving the clay from the mine to the manufacturing plant, and this business amounts to not less than two thousand loaded cars per year. This movement is entirely over the lines of the Terminal Association, but is not competitive with any railroad constituting one of the proprietary lines of said association or with any other railroad and is entirely intrastate business; and,

without the movement of this freight by the Terminal Association, the brick company must necessarily close down its plant and be subjected to irreparable loss. (See Record No. 567, pp. 22, 23 and 24.)

The Union Sand & Material Company has an elevator plant at the foot of Tyler street, in the City of St. Louis, located on the line of the Terminal Association. At this plant all of the sand which it produces for the use of the City of St. Louis and the surrounding territory is elevated and loaded into cars, and it has erected and constructed an elevator plant at this point at a large cost to it, and it owns and uses over 300 cars in moving and delivering its sand from this plant. It has a yard at Bremen avenue for supplying North St. Louis, and a yard at Natural Bridge road for supplying the northwestern portion of the City of St. Louis; and it also supplies a large amount of sand to various industrial plants and factories located on the tracks of the Terminal Association. During the year 1913 there was moved for the Union Sand & Material Company by the Terminal Association from the Tyler street plant to the Bremen Avenue yard and to the Natural Bridge Road yard, and to said industrial plants, over four thousand loaded cars. This movement was entirely over the lines of the Terminal Association, but was not competitive with any other railroad constituting one of the proprietary lines in said association or with any other railroad, and was entirely intrastate business; and, without the move-

ment of the product of the sand company by the Terminal Association from the Tyler Street plant to the other yards and industrial concerns, above set out, it would be impossible for the sand company to supply its sand to the northern or northwestern parts of the City of St. Louis, as to move its said product in any other way than by loaded cars moved over rails would make the cost prohibitive. (See Record No. 567, pp. 25, 26 and 27.)

On the 2nd day of March, 1914, the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in the case of United States of America v. The Terminal Railroad Association of St. Louis *et al.*, entered a final decree in which section 1 on page 2 of said decree read as follows:

> "The defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association, or any of its constituent companies, and from operating any of the properties belonging to it or its constituents, **otherwise than as terminal facilities for the railroad companies using the same.**"

Said section 2 of said decree further provides that the Terminal Association may continue as a lawful unification of terminal facilities "**upon abandoning all operating methods and charges as and for railroad transportation** and confining itself to the transaction of a terminal business **such as supplying and operating**

facilities for the interchange of traffic between railroads". Clause 7 of said final decree specifically provided "this cause is reserved for such further orders and decrees as may be deemed necessary".

After appellants had filed with the Court, on April 12, 1914, their intervening petitions in said original cause—United States of America, complainant, v. The St. Louis Terminal Railroad Association of St. Louis *et al.*, defendants—fifty-three other persons, corporations and industries who stood in like position to the appellants in regard to the movement of freight and business over the Terminal Railroad Association, and who would be affected in the same way by the final decree theretofore entered in said original cause, filed supplemental petitions of intervention substantially similar to the petitions of appellants and asked to be heard upon the motions theretofore filed by these appellants; and these fifty-three parties (not including appellants) represented a movement of freight aggregating 10,299 loaded cars for the year 1913, or, including appellants' loaded cars, said movement of loaded cars for the year 1913 amounted to 16,299 cars. (See Transcript of Record No. 567, pp. 23, 27, 29 and 30.)

Appellants at no time had any knowledge or information that any such question was involved in said cause or that any question of the legality of the movement of their traffic from one point on the Terminal Association tracks to the other was involved, and the

first information they received as to the nature and terms of the final decree as entered in said cause was obtained from the public press on or about the 1st or 2nd of April, 1914 (see Rec. No. 567, pp. 23 and 26). As very grave and irreparable injury would be done to appellants if by the terms of the decree entered in said cause the Terminal Association were precluded and enjoined from continuing to move cars for them from one point on the Terminal Railroad Association's lines to another, appellants at once filed their petition in said cause praying the Court that the final decree theretofore entered in said cause might be so altered, amended and changed as not only to permit the Terminal Railroad Association to continue to perform such services for appellants as said association had been rendering appellants in the past by moving its cars from one point on the line of the Terminal to another point on the line of the Terminal (even though the moving thereof from said initial point to said delivery point be entirely over the lines of said association), and also praying that said decree might be made so clear and plain that appellants and others substantially similarly situated might be entitled to demand and require of said association the moving of cars from one point on the lines of said association to other points on said lines (even though the moving of said cars be entirely over the lines of said association), and that appellants and others similarly situated might be placed in a position

where such duty on the part of said association might be enforced by them should such service be at any time declined or refused by said association; said motions duly verified, being filed with the Court on April 12, 1914. (See Record, Case No. 567, p. 31.)

ASSIGNMENT OF ERRORS.

The District Court erred in denying appellants the right to intervene and the relief prayed for in their petition.

BRIEF.

I.

The Court should have granted appellants the right to intervene and the relief prayed for in their petition.

Equity Rule No. 37.

II.

Appellants were entitled to appeal from the order of the Court denying them the right of intervention and the relief prayed for in their petition.

Leary v. United States, 224 U. S. 567, 56 Law Ed. 889;
Foster on Federal Practice, p. 840;
Minot v. Mastin, 95 Fed. 734;
United States v. Phillips, 107 Fed. 824;
In re Columbia Real Estate Co., 112 Fed. 643;
United States Trust Co. v. Chicago Terminal R. R. Co., 188 Fed. 292.

III.

Under the broad terms of the new equity rule 37, appellants, upon the showing made in their petitions, would undoubtedly be permitted by this Court to intervene in this Court; and certainly in an equitable proceeding, such as this proceeding is, even if they had not intervened below, would, upon the showing made

of their interest in the cause, be permitted by this Court to appear, either by counsel directly representing them in the proceeding, or by counsel appearing as *amicus curiae*.

ARGUMENT.

Poimt I.

So far as the equity rulles adopted by this Court apply, they are the controllling authority upon points of practice. Rule 37, entitled "Parties Generally—Intervention", is an entirely new rule adopted by this Court for the first time in 1912. The power to make these rules is expressly delegated to, and conferred upon, this Court by the statutes of the United States. The purpose of this Court im formulating the new rules of equity practice was, as we understand it, to simplify proceedings, to avoid technicalities, to facilitate the administration of justice, andl to embody in these rules methods of procedure which the Court, from its long experience, had learned to be beneficial. The reports are full of decisions where parties have been deprived of their equitable rights and greatly embarrassed in obtaining justice by reason of technical decisions on the question of the right of intervention. Hence, when this Court adopted Rule 37, and in the last paragraph thereof provided as follows: "**Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention,** but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding"—the Court meant

to lay down the broad principle that in equitable proceedings the rights of a third person should not be emasculated and destroyed without giving that person the right to be heard. The right to intervene is laid down in the broadest terms. It could not be made broader—"**Any one** claiming an interest in the litigation may **at any time** be permitted to assert his right by intervention". There is no limit put upon the time when intervention may be made. Of course, we concede that the party desiring to intervene must not have been guilty of laches, but must act promptly as soon as he ascertains that litigation is pending which may vitally affect his interests, but to which litigation he is not a party. In the case at bar the record shows that appellants first learned that their interests were in jeopardy on the 1st or 2nd of April, 1914 (see Printed Record, No. 567, pp. 23 and 26). They at once prepared and filed with the District Court, on April 12, 1914, their petitions of intervention and for a modification of the decree (see Printed Record, No. 567, p. 31), hence there was no laches on their part.

So far as our research goes, there has been no judicial construction of the force, effect and meaning of Equity Rule 37, but, in our opinion, the rule is so plain and so clear that there can be but one interpretation placed upon it and that is, that in the administration of equity the Courts will permit "**any one** claiming an in-

terest in the litigation **at any time** to assert his rights by intervention".

In the case at bar the record shows that the interests of appellants are vitally affected; that no harm can come to any party to the litigation by granting to the appellants the relief prayed for; that to refuse this relief is to do irreparable injury not only to these appellants but to 519 other industries similarly located (see Printed Record, No. 567, pp. 23 and 27 and Printed Record, No. 572, pp. 24 to 32), and that, too, without appellants ever having been granted a day in court or having been heard in their own protection. Such a result a Court administered upon the broad principles of equity will never permit.

Point II.

The record in this case shows that a denial of the right to appellants to intervene, and a refusal to grant appellants the relief prayed for in their petitions of intervention, is a practical denial of all relief to appellants who have no other means of redress, because, unless the final decree of the District Court is amended, as prayed in the petitions of appellants, the decree becomes absolutely final and binding upon all parties to the suit, and the Terminal Railroad Association will thereafter be absolutely precluded from performing its ordinance and charter obligations to the appellants and others sim-

ilarly situated, and there will be no means by which the question can thereafter be opened. On the question of appeal from an order denying intervention and granting the relief prayed for, Foster on Federal Practice, at page 840, says:

> "Where a denial of the right to intervene is a practical denial of all relief to the petitioner, who has no other means of redress, an appeal will lie from an order denying intervention."

In Minot v. Mastin, 95 Fed. 734—a Circuit Court of Appeals decision of the Eighth Circuit—Thayer, J., in deciding this case, laid down the proposition that where the rights of the intervener are wholly unaffected by the proceedings, or where his rights, whatever they may be, are subordinate to the rights of the parties to the proceeding, or where there are other adequate remedies within his reach and at his disposal, then the right of intervention is discretionary; but that there were other cases where the rights of a third party to intervene in a pending case were so imperative and resting on grounds of necessity and the inability of the party to obtain relief by other means, that the right of appeal cannot be said to be dependent upon judicial discretion.

In the case of United States v. Phillips, 107 Fed. 824—a Circuit Court of Appeals decision for the Eighth Circuit—a case decided by the same Judges as decided 95 Fed. 734, the Court said:

> "This Court has held that there are two kinds of interventions. To the one class belong those cases in which the Court or Chancellor to whom the application is made is not bound to permit a third party to intervene and load the case with collateral issues, and in which the allowance of an intervention is entirely discretionary with the chancellor. To the other class of cases belong those in which the right to intervene is absolute, resting, as it does, upon the ground of necessity and the inability of the intervener to obtain such relief as he is entitled to by any other means than by intervention. Minot v. Mastin, 95 Fed. 734."

In *In re* Columbia Real Estate Company, 112 Fed. 643—a decision by the Circuit Court of Appeals of the Seventh Circuit—the Court recognized this same distinction and held that while a right to appeal from an order denying intervention did not exist, where the right to intervene was discretionary with the Court, that nevertheless an exception existed, saying:

> "A just exception to this rule arises where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled and which he can obtain only by intervention, and where the intervention is not discretionary with the chancellor."

In addition to the above there is one decision by this Court which seems to us to be conclusive on this proposition, and that is the case of Leary's Administratrix

v. United States, 224 U. S. 567, 56 Law Ed. 889. In that case the petition for leave to intervene was denied by the District Court. Intervener appealed to this Court and this Court sustained the appeal, sustained intervener's right to intervene, reversed the case, and directed that leave to intervene be granted to petitioner.

In United States v. Chicago Terminal R. R. Co., 188 Fed. 292 (C. C. A. decision) the Court says application to intervene are of two kinds. One where the applicant has other means of redress open to him, and there it is within the Court's discretion to refuse to encumber the main case with collateral inquiries. The other where the applicants' claim of right is such that they can never obtain relief unless it be granted in the pending case on intervention, and here the right to intervene is absolute and rejection of the petition is a final adjudication and appealable.

Point III.

The questions involved in all of said three appeals turn upon the proper construction and interpretation to be placed upon the decision of this court in the case of United States of America v. Terminal Railroad Association *et al.*, reported in 224 U. S., page 383, and the form of the decree to be entered under said opinion and the mandate accompanying the same. To us the opinion seems clear and the form of decree to be entered thereunder to be specifically set forth in said

opinion (see 224 U. S., *l. c.*, page 411, where this court stated the seven propositions to be covered by the decree to be entered in this case by the District Court). The District Court, in preparing the decree, embraced the seven propositions directed to be embraced therein by this court in its said opinion, but they also added an eighth point embracing a proposition not directed to be embraced in said decree by the opinion of this court, and in nowise called for by the terms of said opinion (see Printed Record No. 567, page 15). This eighth point, so included in said decree, is that part of said final decree which, according to our interpretation thereof, enjoins and prohibits the Terminal Railroad Association from receiving from any person, firm or corporation cars, loaded or unloaded, at any point on its terminal lines and moving same to any other point on its said terminal lines, and delivering same to any person, firm or corporation, where the moving thereof from said initial point to said delivery point is entirely over the lines of the Terminal Railroad Association. It is to the part of the decree prohibiting this service to appellants and to the 519 other industries similarly situated that these appellants object, and it is for the purpose of correcting the decree in this particular that these appellants have appealed.

We have said that in our view the opinion of this court in the case of United States of America v. Terminal Railroad Association, *supra*, is so clear that

there ought to be no difficulty in fashioning a decree in accordance with the terms and provisions of said opinion. Be that as it may, the record shows that the circuit judges, sitting in the District Court, who were required by the mandate of this court to fashion and form this decree, labored over the same for many months and that many differences of opinion existed, and still exist, among these judges as to what the form of this decree should be, and that even when the final decree was at last entered it had not the support of all the circuit judges as to its being a correct interpretation of the views of this court, but was clearly a compromise decree. When entered, the decree did not satisfy the Government as being a proper interpretation of the views of this court, and the Government took an appeal for the purpose of having said decree modified. The final decree did not meet the approval of counsel for the Terminal Railroad Association and they have taken an appeal for the purpose of having said decree modified and changed so as to conform with what they consider a proper interpretation of the opinion of this court.

It appears from the record in this case and the opinion of this court that at no time was the attention of either the lower or the appellate court called to the fact that there were persons situated on the lines of the Terminal Railroad Association who required the movement of freight from one point on its lines to other

points on its lines. In the opinion of this court, 224 U. S., *l. c.*, page 407, it said:

> "Indeed, the defense to this proceeding is based upon the insistence that the Terminal Company is solely engaged in operating terminal facilities defined in the briefs as 'mechanical devices for the exchange, receipt and distribution of traffic.' "

Hence this Court did not know, and the District Court did not know when it entered the final decree prohibiting the moving of freight by the Terminal Association from one point on its lines to another that it was striking a deadly blow at a vast number of great industries which, relying upon the charter and ordinance obligations of the Terminal Railroad Association and the long custom existing in the transaction of its business, had located their industries upon the lines of the Terminal Railroad Association. Had they done so, beyond question, no such prohibition would have been included in the final decree. In view of the vital interest which these appellants have in the modification of this decree; in view of the fact that this decree was entered without either this court or the District Court having any knowledge of the course of business referred to, and the doing of which is absolutely essential to the life of one of these appellants and to some or all of the other industries similarly located and is vital to the success of all of them; in view of the fact that

the transportation prohibited is not competitive with any other railroad and is entirely intrastate; in view of the fact that said decree overrides and nullifies the charter obligations of the Terminal Railroad Association, and also overrides and nullifies its ordinance obligations; in view of the fact that the transportation prohibited by said final decree, and heretofore done by the Terminal Railroad Association for appellants and others similarly situated, can, in no possible way, under the conditions existing and shown by the record, further an illegal combination; in view of the fact that if the decree had drastically enforced the provisions of the Sherman Anti-Trust Act and dissolved the Terminal Railroad Association into its constituent parts, it would have been a business which each constituent part could have continued to do and perform under its charter and under its ordinance obligation; and in view of the fact that it would be grossly inequitable and unjust to the appellants and the many other local industries similarly situated, whose very life is threatened in many cases, whose business is practically destroyed in many cases, and whose business would be totally destroyed in many cases; we appear before this court, which now has before it the question of properly interpreting its opinion and of formulating the decree which it intended should be formulated thereunder and ask

that our interests be protected by a proper modification of the decree of the District Court.

We care not whether we be considered as interveners below appealing to this court or as interveners appearing as original interveners here, or as having a hearing in this court by counsel acting as *amicus curiae*, for we know that this court, with the facts before it, and acting as the high court of chancery in the administration of justice, will willingly hear our plea and will not close its eyes nor shut its ears to any facts which may throw light upon the situation and which will aid it in carrying out the golden rule of equity jurisprudence—that right and justice must prevail before all else, and that a court of equity will never lend itself to work an injustice upon any man when, by its decree, it may protect the rights of every man and do injustice to none. Even if these appellants had no standing before this court from a technical standpoint, yet if they could bring to the knowledge of this court facts which show that any proposed action which it was sought to have this court take would be grossly inequitable and unjust as to them, this court would not shut its eyes to those facts, but would gladly receive any information which would throw light upon any proposed action it was requested to take.

As we have said, the law of this case will be found in the decision of the Supreme Court of the United States

in United States v. Terminal Railroad Association, 224 U. S. 383 (56 Law Ed. 810). Our endeavor will be to apply the principles as enunciated in the decision of the Supreme Court to the facts set forth and shown in the intervening petitions and show to this court that under that decision a grievous wrong has been done to the intervening petitioners, and that the modification of the final decree of the District Court as prayed in the petition of interveners should be granted, and that the granting of such change in the said final decree as heretofore entered will not only not be inconsistent with what is laid down by the Supreme Court in its decision, but will not be inconsistent with the specific directions in regard to the form of the decree which the Supreme Court directed should be entered in this case.

It is apparent, from a reading of the decision of the Supreme Court, that neither the trial court nor the Supreme Court had ever had called to its attention the movement of freight and traffic over the Terminal Railroad Association such as that done by the Terminal Association for intervening petitioners herein. Undoubtedly, at the trial of this case, the Terminal Association was fighting for its very existence, and the main burden of its defense was based upon the proposition that it—the Terminal Railroad Association—was solely engaged in operating terminal facilities and nothing else. In fact, on page 407 of its opinion, the

Supreme Court says this in so many words; the exact language used by the Supreme Court being as follows:

> "Indeed, the defense to this proceeding is based upon the insistence that the Terminal Company is solely engaged in operating terminal facilities defined in the briefs as 'mechanical devices for the exchange, receipt and distribution of traffic.' "

We do not mean to intimate or to suggest that in making this contention the Terminal Railroad Association was actuated by any unfair motive. Doubtless it looked upon the business such as it was doing for interveners as purely incidental and as being purely a switching service and therefore as one in nowise coming within the prohibition of the statutes; and, further, that since under its charter and under the obligations assumed by it under the ordinances giving it the right to use the streets of the City of St. Louis, it was obligated to do this business; and since the doing of this particular line of business in which appellants are interested in nowise entered into the controversy, it was but natural that it should be kept in the background; hence we find no reference to this phase of the movement of traffic in the opinion of the Supreme Court. That opinion first discusses and sets forth elaborately the organization of the Terminal Railroad Association. It analyzes the agreements out of which the consolidation grew; it discusses the organization and development of terminal associations or systems and

why the development and growth of such systems are beneficial when properly administered; it quotes from the decision rendered by the Supreme Court of Missouri in the case of State *ex inf.* v. Terminal Railroad Association, 182 Mo. 284, to show that under the peculiar conditions existing in the City of St. Louis the unification of the various independent terminal facilities was permissible even under the drastic anti-consolidation provision of the Constitution of the State of Missouri; it then finds as a matter of law that the Terminal Association as operated in the City of St. Louis was in contravention of what is commonly known as the Sherman Act, and gives the reasons, and we must look to these reasons in determining and ascertaining just what the full force and effect of this decision is. The reasons, briefly stated, of the Supreme Court for holding the Terminal Association "a bad trust" are:

First, because under its terms of organization no other railroad could come into the association and have the benefit of the terminal facilities except by the unanimous consent of all the then proprietary lines.

Second, because of the arbitrary, which the court held to be discriminatory and extortionate.

Third, because of the practice of re-billing from East St. Louis to St. Louis and making a distinct hauling charge from East St. Louis to the City of St. Louis.

These, and these only, are the things which the Su-

preme Court found to be unlawful, and these, and these only, are the things which, in the opinion of the Supreme Court, brought the Terminal Association within the terms of the Sherman Act. Excepting for these things, the court not only intimates, but plainly states, the organization would have been legal. On page 410 of its opinion (56 Law Ed. 819), the opinion reads:

> "Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what it is claimed for it—a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated, and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietary companies as shall constitute the former the *bona fide* agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration, to which we have referred, will amply vindicate the wise purpose of the statute and will preserve to the public a system of great public advantage."

The decision then lays down what the terms of the decree shall be, which, according to the opinion of the Supreme Court, would transform the defendant from a "bad" to a "good" combination. The opinion states

specifically what the decree shall contain; it provides that the decree shall cover the following points:

First, it shall provide for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties.

Second, it shall provide for a plan of re-organization of the Terminal Association which shall definitely provide for the use of the terminal facilities of the association by any other railroad not electing to become a joint owner.

Third, it shall provide for eliminating from the then existing agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Fourth, it shall provide for the complete abolition of the practice of billing to East St. Louis and then re-billing traffic destined to St. Louis or points beyond.

Fifth, it shall provide for the abolition of any special or so-called arbitrary charge for the use of the Terminal facilities in respect to traffic originating within the so-called hundred-mile area that is not equally applied to all other traffic of a like character.

Sixth, it shall provide that any disagreement between any company applying to become a joint owner or user and the Terminal Association which shall arise after a final decree may be submitted to the District Court.

Seventh, it shall contain a provision that nothing

therein shall in anywise, or at any time, affect the power of the Interstate Commerce Commission over rates to be charged by the Terminal Company.

These are the seven points which the opinion of the Supreme Court directed should be specifically covered, but the decree, as now drawn, **adds an eighth point not** required by the opinion of the Supreme Court, and which would, if enforced, produce the conditions of which these intervening petitioners have complained.

The Supreme Court said in its opinion, on page 409 thereof:

> "We come now to the remedy: In determining what this should be we, as said by this court in Standard Oil Company v. United States, 221 U. S. 1, 78, must not overlook the fact that in applying a remedy 'injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce, is the foundation upon which the prohibitions of the statute rests, and moreover that one of the fundamental purposes of the statutes is to protect and not to destroy rights of property.' "

Now, the decree entered by the District Court under the mandate of the Supreme Court based upon the opinion of the Supreme Court when this case was before it, strictly follows the form of the decree specified and provided for in the decision of the Supreme Court, saving and excepting in the first paragraph thereof; and this is the paragraph under which these intervening

petitioners will suffer irreparable injury unless the terms thereof are modified and changed as prayed herein. By the terms of this section, the Terminal Railroad Association is "**perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association, or any of its constituent companies, and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same.**" And may continue as a lawful unification of terminal facilities "**upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads.**" If this language be given a literal construction, the Terminal Association would thereby be enjoined and prohibited from performing the services for petitioners of moving cars from one point on the Terminal to another point on the Terminal, even though such movement was entirely intrastate, was non-competitive with any railroad constituting one of the proprietary lines in said association or with any other railroad. This would not be a serious matter with the Terminal Railroad Association because if this prohibition were enforced as to it and its revenue fell below the required amount necessary to meet expenses and pay interest charges, all that it would have to do would be to make an assessment upon

the proprietary lines sufficient to make up this deficiency; but to these intervening petitioners—the Union Sand & Material Company, the Evens & Howard Fire Brick Company, and the five hundred and nineteen other industrial interests affected by this decree if literally enforced—it would be a crushing blow. The brick company would be compelled to shut down; the sand company would be unable to deliver a vast quantity of its product; the five hundred and nineteen other industries would be cut off from the handling of twenty-six thousand loaded cars a year, and not only that, but the general public would suffer great inconvenience and loss. To state these facts is to show the seriousness of the position which must be apparent at a glance.

For, under present methods of doing business, there is no way in which the damage could be obviated. It would be impossible to move the vast amount of freight now carried in the more than thirty thousand cars by wagon transportation, for the expense and delay would be prohibitory. The only other possible way of moving this freight would be by a system of consigning the cars, first to some railroad company, and then re-consigning them to the point on the Terminal System to which they were originally intended, but this would not be a practical solution, for it would greatly increase the cost, it would very greatly extend the time for deliveries, and, after all, would be merely a technical evasion of the terms of the decree as the same now

stands. Further than that, if the decree as now entered stands it nullifies the charter obligations and the ordinance obligations of the constituent members which go to form the present Terminal Association and brings to naught those wise provisions of the charter and the ordinances under which the constituent members of the Terminal Association were granted rights in and over the streets of the City of St. Louis whereby they obligated themselves to receive from any person, firm or corporation that shall have connection with its tracks within the City of St. Louis any and all loaded and empty cars, and agreed to deliver said cars to any other person, firm or corporation that shall have connection with its tracks and agreed to move such cars, loaded or unloaded, from the point received to any other point on its line of railway without discrimination or delay, at and for a sum of money not to exceed one dollar for each loaded car so moved from any point on the line of said Terminal to any other point on the line of said Terminal; and it nullifies and brings to naught the rights of the various persons, corporations and industries which, relying upon such charter and ordinance obligations of the constituent companies that go to form the Terminal Association, have invested their money in large industrial plants on the line of said Terminal Association, the very life and being of which is dependent upon the carrying out

and the fulfillment of said obligations by the Terminal Railroad Association.

And further than that, it seems to us that it logically resolves itself into this: That what the constituent units which go to form the Terminal Association could lawfully do; that what they were legally obligated to do, both at common law and under their charter and ordinance obligations, they are now prohibited from doing when combined into one corporation, and careful provisions of the state law and of the city ordinances, made for the purpose of protecting its citizens against oppression and injustice on the part of terminal companies to which have been granted valuable public franchises, are brought to naught by the form of the decree which has been entered in this cause. We cannot think that such was the purpose or intention of the Supreme Court, and we feel sure that the situation as it actually exists, so far as the interests of the intervening petitioners are concerned, was never brought to the attention or knowledge of the Supreme Court.

When this court came to the conclusion that the Terminal Association, as then operated, was being operated in contravention to the Sherman Act, it did not apply drastic treatment in the way of punishment, for it recognized that at the basis of the whole thing lay the question of what was for the public good. It recognized that the unification of terminals was, gener-

ally speaking, a good thing for a city for reasons stated in the opinion of the court and for reasons stated in the excerpt from the opinion of the Supreme Court of Missouri in 182 Mo. 284, and it said that in applying the remedy **"injury to the public by the prevention of undue restraint or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rests, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."** And so we say that the opinion of this court did not demand or require the entering of the first paragraph of the decree entered herein in the words and in the form in which it has been entered by the District Court; that to modify and alter said paragraph of the decree, as prayed by the intervening petitioners, would not be any infringement of the duty and obedience which the District Court owed to this court, nor would it be any departure from a strict enforcement of all the terms and conditions laid down by this court to govern the form of decree to be entered in said cause, but, on the contrary, in our opinion, to enter the decree in the form in which it now stands is at variance with the doctrine laid down by the Supreme Court in the Standard Oil case and in the case against the Terminal Railroad Association, to-wit: **"That one of the fundamental purposes of the statute is to protect and not destroy rights of property."**

In view of the conditions shown to exist in connec-

tion with the movement of cars of intervening petitioners, we respectfully submit that the final decree entered in this cause by the District Court should be altered, amended and changed as prayed in the intervening petitions filed herein, and we would suggest that said amendment and change of said decree be made in the following manner:

By adding a proviso to paragraph 1 of said decree substantially to the following effect:

> "Provided, however, that nothing contained in this decree shall be so construed as to prohibit the Terminal Railroad Association of St. Louis from receiving from any person, firm or corporation cars, loaded or unloaded, at any point on its terminal lines and moving same to any other point on its said terminal lines and there delivering same to any person, firm or corporation, even though the moving thereof from said initial point to said delivery point be entirely over the lines of the Terminal Railroad Association."

Or else, if the decree be entirely redrafted in this court, that it be so drafted as not only to preserve the rights of these appellants and others similarly situated, so that the Terminal Railroad Association may continue to perform the services for said appellants and such other persons as it is, and has been, rendering for many years past, but that the terms of said decree be so drafted that appellants and others similarly situated

may be entitled to demand and require of said association the continued performance of said services.

Respectfully submitted,

John F. Lee

Geo. M. Black

Solicitors for Appellants.

MAPS
TOO
LARGE
FOR
FILMING

No. 567.

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

EVENS & HOWARD FIRE BRICK COMPANY,
Appellant,

vs.

THE UNITED STATES,

PETITION FOR INTERVENTION.

Appeal from the District Court of the United States for the Eastern District of Missouri.

STATEMENT.

We submit jointly for convenience the motion to consolidate and the right of petitioners to intervene in one Statement and Brief.

The United States is complainant in this case. It is conservator of the public interest and welfare and it speaks for the public.

The petitioners cannot intrude into this litigation to protect the public interest or as "*Amici Curiae*" so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion.

The Government through its legal representative appeared in the court below and appears here disapproving and objecting to the filing of the intervenors' petition. The petitioners can, therefore, intervene only for the protection of their *own individual interests.*

This court being familiar with the litigation knows that the general object of the original suit was to break the combination of the fourteen defendant railroad carriers which controlled interstate commerce at the St. Louis, Mo., railway gateway.

The allegation in the bill and prayer in the case shows the above statement as to the object of suit is correct. (See Abstracts of pleading and evidence in original case No. 386, October Term, 1911, of this court, pp. 34-45.)

The effort to intervene in this case is for the purpose of procuring this court to decide the defendants can operate the jointly owned terminal facilities at the St. Louis, Mo., railway gateway as a railroad transportation property. In the opinion handed down by this court, April 22, 1912, the court expressly held that it would permit the continuance of the joint ownership of the three combined terminal properties by defendants only on the condition that *defendants immediately cease operating said three properties as a railroad transportation com-*

pany and operate same only as a terminal company, which defendants at the time claimed and this court found they were not doing. Therefore, this attempted intervention is for the purpose of procuring in this case after entry of final decree a re-hearing on a question already decided. The defendants were charged by the Government with being *a combination of railroads carrying on interstate* transportation and defendants denied the charge and defended the combination on the ground that the Terminal Railroad Association was only used *by defendants as terminal facilities* and not as a railroad transportation company. But this court found defendants had been acting as a *railroad transportation* company and ordered such use of *the combined properties stopped.* Defendants themselves are, therefore precluded from coming into court in this case and taking the position that they are a transportation company. This court has passed on the right of defendants to act as a transportation company in the operation of the three combined *terminal properties and denied it.* Intervenors seek to reopen that question. Intervenors should not be allowed to re-try this case for the purpose of obtaining a modification of the decree by incorporating therein an order which in legal effect would be *contrary to and nullify* the finding and *decision of the court heretofore made in this case.*

Petitioners seek by intervention to impeach the decree by altering it so as to allow instead of prohibit, as it now does, defendants to operate the three combined terminal properties as a railroad transportation company.

The intervenors thus seek to come into this court subsequent to rendition of decree and overthrow the decree by intervention, and the foundation of their right is based on the proposition that *defendants should be ordered to continue in the future as in the past to operate the three combined terminal properties as a railroad transportation company* as distinct from a terminal company in hauling freight offered by petitioners. If this claim of petitioners has any foundation legally it can only arise from the fact that under the law the defendants must operate the three combined terminal properties, Wiggins, Merchants and Terminal Railroad Association properties *as a railroad transportation company and not merely as terminal properties for interchange of traffic between railroad carriers.* If it is legally true that defendants must so operate said three properties as a transportation company, and in the future the defendants should refuse so to do (bear in mind there is no allegation in interventors' petition that defendants have now defused) and refuse to accept freight offered to be transported over the three combined properties as a transportation company, petitioners' remedy by an independent action is very plain and clear. If the shipment, whether intra- or interstate, is offered and refused, if defendants bound to carry as transportation company, an adequate and speedy remedy can be applied for in proper court and obtained by petitioners immediately because all railroad *companies acting as transportation companies for hire owe a duty to carry for all.*

If intervenors *have another adequate remedy* clearly

they cannot intervene *here after decree* in lower court. The petitioners seek after entry of *decree to impeach* same by overthrowing and altering it. This they can only do by *an independent proceeding and not by intervention.*

Again, the statements in *intervenors' petition shows the petitioners seek prevention* of possible proposed future action by defendants under the decree, for the allegation is that "a very grave and irreparable injury would be done to it, if by the terms of the decree entered in this cause the Terminal Association were precluded and enjoined from *continuing* (Underscoring our own) to move its clay from said mine to said plant. or move the empty cars of this petitioner from said plaint to said mine."

We submit in the instant suit no one other than the United States, *the complainant* herein, can raise the question as to whether or not a *proposed* action in the *future* would or would not violate the spirit and purpose of the decree, and as petitioners are strangers to the record in this case they cannot be allowed to raise the question by intervention of the legality or illegality of proposed *action* under the decree herein as the petitioners could litigate and determine in an independent suit between defendants and themselves the legality or illegality of any action defendants might take in the *future with reference to the refusal to accept and transport freight offered by petitioners* and therefore petitioners should not be allowed to intervene in this case.

This suit was begun in 1905 in the District Court of the United States of the Eastern Division for the Eastern District of Missouri and is a proceeding to enforce

the provisions of the Sherman Anti-Trust Act against fedendants; issues of facts were made by the pleadings and a Commissioner was appointed to take the testimony and he reported the same to the court without any findings either as to law or facts, and the case was submitted before the four Circuit Judges of the United States Court of Appeals, and the judges being equally divided in opinion as to whether or not the Government was entitled to relief they certified the case to this court, where upon motion made by Government on January 31, 1910, the cause was remanded because no final judgment had been entered below.

On June 6, 1910, Government filed in lower court a motion asking for re-argument of said cause.

Afterwards four Circuit Judges made an order deciding that the plaintiff could not prevail because only two of the judges were of the opinion that the complainant was entitled to relief, while two were of the opinion it was entitled to no relief, and the court denied the motion and dismissed the bill of complaint.

Afterwards, on August 1, 1910, petition for appeal was duly filed and in proper time and manner appeal was perfected to this court, and the case was argued on testimony taken and case submitted here on October 20 and 23, 1911, and opinion handed down April 22, 1912, therein reversing the decree of the lower court dismissing the bill and declaring defendants an illegal combination under the Anti-Trust Act.

On May 23, mandate of this court was issued, and on June 3, 1912, the Government filed a motion for the entry of a decree in pursuance of mandate of the Supreme Court and accompanied the same with a proposed in-

terlocutory decree. Controversy arose as to entry of this decree, which resulted in prohibition proceedings in which this court held that district judge sitting alone in the District Court could not enter the decree in this case, but must be entered by Court of Appeals Judges sitting in the District Court.

On March 2, 1914, the Circuit Judges sitting in the District Court entered a final decree in this cause in pursuance of the mandate of this court, and on March 27, 1912, complainant appealed to this court.

On April 12, 1914, complainants, intervenors herein, filed a motion in same cause asking leave to intervene, which was denied by lower court. The intervenors then appealed.

Petition of intervenors specifically alleges the business carried on by defendants for petitioners is that of *a railroad transportation company.* The intervenors then ask that the decree be modified so that the defendants may act as a railroad transportation company for petitioners and five hundred and twenty-one other persons and industries.

This court found that the *fourteen defendant roads* could not legally use *the combined* terminal properties as a *railroad transportation company,* because so to do would be to violate the Sherman law prohibiting, as interpreted by this court, the consolidation of parallel and competing railroad carriers. Therefore, to ask the court to so alter and change the decree is for intervenors to directly contest *the general object* of the Gov-

ernment suit, which as *intervenors petitioners cannot do.*

The intervenors, after decree entered, are seeking to impeach the validity of the decree, and this cannot be done by intervention but only by an original suit.

The intervenors seek to have legalized, transportation by defendants, over the three combined Terminal properties, as railroad common carriers. Intervenors cannot try by intervention the issue between defendants and themselves as to whether or not the defendants can be compelled to transport freight for intervenors as a railroad common carrier. If *intervenors have* such a right it can be *asserted in an independent action.* If intervenors are coming in as complainants their petition must be in subordination to and in recognition of the propriety of the main proceeding. Intervenors herein contest the general object of the suit. If intervenors come in as defendants they cannot assert any claim the defendants could not assert. But intervenors herein set out the fact that they have acquired property on assumption defendants had the right to act as a common carrier and were induced to buy a clay mine because they believed defendants could act as a railroad common carrier.

If defendants had plead these facts as a defense to the charge they were restraining commerce this court would not have listened to the defense, and if defendants could not set up defense above mentioned the intervenors cannot make the facts a basis for intervention. The intervening petition fails to disclose peti-

tioner owned fire clay mines before this suit was brought. This should be shown *because if acquired* pending this action *intervenors* should have no *right to intervene.*

The allegation of the intervening petitioners about being informed as to *what defendants* have done or are about to do as to *filing petition to show* other persons similarly situated as intervenors is *idle and wholly useless* and need not be noticed. Intervenors are not *guardians of the public welfare* and presumably at least not especially representing the interests of the defendants.

Intervenors fail to state defendants have refused to transport as a railroad common carrier the clay mentioned in intervenors' petition.

The intervention petition herein raises issues of fact and, of course, this court will not after a decision of the case and the entry of a final decree in the lower court assume at suggestion of intervenor the functions of a trial court to try an original case wherein is involved issues of fact.

The petition of intervenors does not show they were not guilty of laches in filing the petition, but the record in this case shows intervenors were *guilty of gross laches.* This litigation had been going on *for eight years* before intervenors acted and was a matter of common knowledge because the newspapers in recording current events had for said time of eight years been giving a *great deal of publicity to this case.*

The petition of intervenors does not even notify this court, except inferentially, that this was a proceeding

by the Government under the Federal Anti-Trust Act.

This petition should not be considered in this court (as intervenors in their brief seek to have done) as an original petition filed in this court because the intervenors have *been guilty of laches in waiting* until after the *final decree* was entered and because the petition of intrevention filed after entry of final decree seeks to impeach the decree and to re-try the issue originally tried between the Government and the defendants, and also seeks to try and have *adjudged as between the defendants and intervenors* a controversy that petitioners *allege inferentially may arise* in the future as to whether or not the defendants could legally be compelled *to carry as a railroad common carrier* the fire clay of intervenors from the clay mine to their plant and complainant submits this question is not properly triable in an intervention proceeding and therefore by reason of the foregoing facts intervenors' motion to consolidate should be overruled and intervenors' petition denied if considered as an original petition, and if considered as a proceeding on appeal that the action of the lower court refusing intervention to petitioners should be affirmed.

BRIEF.

I.

The United States is complainant in this case and it is the conservator of the public welfare and has a right to speak for the public. Intervenors cannot intrude in this case merely to protect public intrest so long as Government is present by its Attorney General protesting against such intrusion. To allow such intrusion would be wresting from the Government that control over litigation which it has a right to exercise. The petitioners can intervene only for the protection of their individual interset.

United States v. Northern Securities Co., 128 Federal R., Loc. Cit., p. 812.

II.

In an anti-trust proceeding to restrain and prevent a combination in violation of Sherman Law the court will not permit an intervention by private individual over the objection of the Attorney General for the purpose of obtaining a modification of the decree by incorporating therein an order which in legal effect would be contrary to the finding and decision of the court theretofore made in the case.

United States v. Northern Securities Co., 128 Federal R., p. 808.

III.

Intervenors were guilty of gross laches in not filing petition earlier as case had been in court eight years and opinion of court had been rendered and mandate issued almost two years before petition of intervenors was filed.

Foster's Federal Practice (5th Ed.), Vol I, Sec. 258, p. 831.

Barton Safe Deposit Co. v. Rapid Tel. Co., 67 F., p. 165.

State Trust Co. v. K. C. P. & G. R. R. Co., 120 Federal R., p. 308.

United States v. McGee, 171 Federal R., p. 209.

IV.

The intervening petition filed after final decree in lower court attacks and attempts to impeach the decree. The intervenors seek to impeach the decree by altering it so as *to deprive it of power to prevent fourteen defendants from operating the jointly owned Terminal Railroad Association as a transportation company and railroad common carrier. Intervenors* seek in this way to overthrow *the decree although they come into court subsequent to its rendition. An intervenor, after final decree, cannot impeach the validity of the decree.*

State Trust Co. v. K. C. P. & G. R. R. Co., 120 F. 308.

United States v. Northern Securities Co., 128 F. 809.

United States v. McGee, 171 Fed., p. 209.

V.

Intervention will not be allowed after submission of cause and its decision and entry of final decree.

Foster's Federal Practice, Vol. 1 (5th Ed.), Sec. 258, p. 830.

United States v. McGee, 171 Federal R., Loc. Cit., p. 213.

VI.

The lower court had no authority to allow intervention by the petitioners because an appeal had been perfected before the intervening pettition had been filed.

Broson v. LaCrosse, 1 Wall. 405-409.

Burnham v. North Chicago Street Ry., 87 Federal R., p. 168.

VII.

The intervention if made by petitioners as complainants must be made in subordination to the main case.

Equity Rule 37.

Foster's Federal Practice, Vol. 1 (5th Ed.), Sec. 259, p. 838.

VIII.

Petioners necessarily *must found their right* to have defendants *accept freight* and carry same as a Transportation Co. over *combined jointly owned* properties of Wiggins, Merchants and Terminal Association Companies on contention that defendants can

legally operate the three properties named as a railroad *transportation* company, and this court having *decided defendants could not legally* operate three above mentioned combined properties as a railroad *transportation* company, necessarily the relief asked for by petitioners that defendants be compelled to so operate said properties *as a transportation company* manifestly would *impeach* the decree and thus overthrow it although petitioners are strangers to the record and came into court *subsequent* to the rendition of the decree and as they can readily enforce by an original independent proceeding the right, if any which they claim to possess to compel defendants to use combined terminal properties *as a transportation company,* petitioners should not be allowed to intervene.

State Trust Co. v. K. C. & P. E. R. R. Co., 120 Fed. eral R., Loc. Cit., pp. 407, 408.

Louisville & Nashville R. R. Co. v. Cook Brewing Co., 223 W. S. R., p. 69, 56 L. Ed., p. 355.

IX.

Petitioners in their petition pray for relief against possible proposed future action under decree by defendants and therefore present a possible future question that might arise between petitioners and defendants and which question as to the *right* of defendants *to refuse to accept freight for transportation* as a railway company to be carried over three combined jointly owned terminal properties is a matter which *could* properly be litigated and *determined in an independent*

suit between defendants and petitioners and hence cannot be raised by intervening petition in this case. The petitioners are strangers to the record and cannot raise in this case the question as to whether or *not proposed future action of defendants would or would not violate the already entered decree.* In the instant suit the *United States* is the only one that *could* raise the question as to whether or not a proposed action was illegal or in violation of the spirit and purpose of the decree.

United States v. Northern Securities Co., 128 Federal R., p. 808.

ARGUMENT.

Intervenors in their petitions charge defendants are *now* and have been operating the Terminal Railroad Association of St. Louis as a Railroad Transportation Co. (See Printed Record in case 467 containing copy of Intervenors' petitions.)

The Government in the original bill charged and proved and this court found defendants were operating the Terminal Railroad Association of St. Louis, Mo., as a Transportation Company. This court decided that the operation of the Terminal Railroad Association as a Transportation Company by the fourteen defendants was a violation of the Sherman Anti-Trust Act and that defendants must cease to so operate said properties and confine the operation thereof to Terminal uses only.

Intervenors now *after entry of final decree* come into court as *strangers to the record* and ask the court to *alter* the decree in an *intervention* proceeding and to make an order compelling the defendants in the future to operate the three combined and jointly owned railroad companies, to-wit: Wiggins, Terminal Association and Merchants Co. as a *railroad transportation company.*

The intervenors' right to relief sought is founded on the claim that defendants should be compelled to operate the combined Terminal properties *as a Railroad Transportation commmon* carrier; intervenors asking

for this relief on the ground that defendants *now are and in the past* have been operating the three above mentioned jointly owned combined Terminal properties *as a Transportation Company,* and seeking an order from this court compelling defendants to continue *in the future* to so operate as a *Railroad Transportation Company, said properties,* they manifestly *seek to impeach* the *already entered decree by depriving* it of the effect of a decree *preventing operation* of said properties as a Railroad *Transportation* Company which it was intended to have. Intervenors' petition proves defendants are *now* operating and *have been* since, and *were before the rendition* of the opinion in this case, operating the combined Terminal properties as a *Railroad Transportation Company,* in direct violation of the *decision* of this court and of the *decree* entered in the court below.

Intervenors' petitions allege they are now in conjunction with defendants, using the above mentioned combined Terminal properties as a Railroad Transportation Company in direct violation of the already entered decree of the lower court, and in so doing petitioners and defendants are not conforming to the *opinion of this court as interpreted by the Judges of the Circuit Court of Appeals.*

We respectfully submit that at least the petitioners should show they are complying with the interpretation of the opinion of this court by the lower court pending a proposed hearing to establish any rights they claim are being violated by the entered decree.

The allegations in the petitions showing the de-

fendant *are now* and always have been operating the combined Terminal properties as a Transportation Company, place the defendants in the attitude of having claimed in this court that they were only using the *combined properties* as *Terminal* properties while in fact they were then using them as a Railroad Transportation Co.

The fact that many industries were located on these tracks and that passenger trains were run by defendants as a regular Railroad Transportation Company runs trains was all proven by the Government in the original hearing, and this testimony was all before this court when the opinion was written in the case.

The *defendants knew* all about the fact that they were using the three combined Terminal properties *as a Transportation Co.*, to carry freight for petitioners and the several hundred other industries mentioned in Intervenors' petitions when the case was here for argument and decision before; and petitioners also knew the same facts. That was three years ago. Defendants *knew* and petitioners *should have known* defendants *were charged by the Government* with violating the Sherman Law by operating the combined properties as a Railroad Transportation Co., and neither petitioners nor defendants should *now* be heard to say that the case should be practically retried to enable petitioners to settle the relationship that should exist between defendants and petitioners. Petitioners must found their rights on the claim that defendants are a *Railroad Transportation Co.* as *distinguished from a mere Terminal Company.* If petitioners' claim is correct, then petitioners *can institute an*

independent action and compel defendants *to continue to carry freight for them as a Railroad Transportation Company.* Therefore, on *petitioners' own theory they have no standing as interveners in this case. Petitioners must stand or fall on the clear cut issue that defendants can or cannot operate* the three combined *Terminal properties as a Railroad Transportation Co.*

The decision of this court was decisive that defendants *could not* operate the said combined Terminal properties as a Railroad Transportation Co., and that if defendants did not discontinue operating said properties as a railroad company and use same only as Terminal properties, the court would dissolve the combination because it was, as then operated, illegal, and a monopoly.

The court said to defendants: "You can exist only as a Terminal Co." Petitioners now seek to have defendants allowed to exist as a Railroad Transportation Co. as well as a Terminal Co., and the only reason advanced why the *special dispensation* as to petitioners should be made is that petitioners were induced to buy property and conduct a business under the mistaken belief that *defendants could combine and monopolize all the Terminal facilities at St. Louis, Mo., and operate the same as a Railroad Transportation Co.* The law must apply to all alike and no exception can be made because of peculiar conditions surrounding some individuals and their business.

The use as a Transportation Company of the property of the three combined companies by defendants to carry the freight sought to be transported by petition-

ers *necessarily involves the use of the combined properties,* and therefore this is illegal.

It is no answer to say, as petitioners declare, that "None of the business so being moved by the said Association for these petitioners over its own lines was competitive with any railroad constituting one of the proprietary lines in said Association, or with any other railroad," because the fact remains to handle petitioners' business, the combined property and agency of fourteen railroads, to-wit: the Terminal Railroad Association of St. Louis, Mo., and its property is used to carry *on Railroad Transportation* business and this is illegal.

The defendants cannot be at the same *time a Terminal Co.,* only when defending itself in this court, and be actually a railroad *transportation company monopolizing* the interstate commerce of St. Louis. The remainder of the time, defendants must be either a Terminal Co. only, both here and in St. Louis, or a Railroad Transportation Co., both in this court and in the actual business world at St. Louis, Mo.

To petitioners and the transportation world at St. Louis, defendants appear as operating *the Terminal Railroad* Association as a *Railroad Transportation* Company, and to the court, when arraigned at the bar of justice to answer for infraction of the law so far as a lifeless, fleshless corporate entity can be made to answer, defendants seek to appear as operating the Terminal Railroad Association of St. Louis, as *a mere terminal facility only,* and not otherwise.

When the Terminal Railroad Association of St. Louis is haled into court, it vanishes as a *Railroad Transportation Co.,* like the childish vision of a dream, and in place of a corporate culprit, lo! there appears at this bar a public benefactor in the guise of the Terminal Railroad Association of St. Louis, as a *"Mere mechanical device used only for exchange of traffic between railroads, and operated solely as a Terminal facility."*

No matter in what light defendants may appear to petitioners, whether as a *Railroad Transportation Co.,* operating as such the combined Terminal properties or as a *mere Terminal Co. only,* the defendants stand before this court and the law stripped of all privileges so far as the Terminal Railroad Association is concerned except *the one privilege of operating said Terminal Association as a combined, jointly owned property of defendants solely as a Terminal Co., and not otherwise,* and no suppositions or presumptions or mistakes of petitioners or others can or should be allowed to permit defendants to continue the violation of law by operating the said properties as a Railroad Transportation Co.

The petitioners, if they have any rights, can protect them in an independent suit. The petitioners in the instant suit cannot intervene after entry of the decree to impeach the decree by altering it so as to change its intended effect of prohibiting the defendants from operating the combined Terminal properties as a Transportation Co. *This can only be done in an independent suit.*

POOR COPY

The petitioners have been guilty of laches in standing by for eight years after litigation began and two years after case decided before attempting to assert their rights, if they ever had any, and they should now be barred from *asserting same in this action.*

The petitioners could not intervene in lower court because case had been appealed before they filed their petition. Petitioners cannot come into this court under Section 5 of Anti-trust Act and be heard because they are strangers to the record and are attempting to impeach the decree already rendered by having this court determine the question of the relation and rights of defendants and petitioners as to a shipment of freight or refusal to accept in the future, shipments of freight when offered defendants by petitioners.

The question as to whether or not defendants stand in the relation of a railroad transportation company to petitioners in operating the combined Terminal properties can be litigated in an independent suit between defendants and petitioners.

Therefore the petitioners should be denied th right to intervene here or in the lower court.

Edward C. Carr
Special Asst.
to Attys. Gen'l.

EVENS AND HOWARD FIRE BRICK COMPANY *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 567. Argued October 20, 1914.—Decided February 23, 1915.

The court below, in settling the decree on the mandate of this court has no power to allow persons who were not parties to the action to intervene. This court, however, can take action on an original petition for intervention in this court. (See pp. 194, 199, *ante*.)

THE facts are stated in the opinion.

Mr. George M. Bldock, with whom *Mr. John F. Lee* was on the brief, for appellants.

Mr. Edward C. Crow, with whom *The Solicitor General* was on the brief, for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because as the result of a previous final decree and an appeal taken therefrom by the United States, the authority of the court over the subject-matter was ended. In effect the relief which was sought to be accomplished by the intervention below has been obtained as the result of an original petition for intervention here and our action this day taken thereon. As those applying to intervene were not parties to the record, we are of opinion that the court below had no power to allow them to intervene under the circumstances which existed and its judgment refusing their application was therefore right and is

Affirmed.